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# THE LAW OF INSTRUCTIONS TO JURIES

IN CIVIL AND CRIMINAL CASES

Rules and a Collection of  
Approved and Annotated Forms

By

EDWARD R. BRANSON

THIRD EDITION

By

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Judge, Sixteenth Judicial Circuit, Wisconsin

Volume 2

FORMS

MOTOR VEHICLES

1960 Replacement

By

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## MOTOR VEHICLES

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### CHAPTER 10

#### MANUFACTURERS, DEALERS, SALES AGENCIES, GARAGES, AND FILLING STATIONS

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#### § 300. Rights and liabilities between manufacturers, dealers, and salesmen.

##### Pennsylvania

The commissions on the cars to which Mr. F. was entitled are fixed by the contract, and they are easily calculated. After you have ascertained the number of cars, if any, on which he was refused a delivery, you may ascertain the amount of the commissions. But that would not be the measure of damages. His net profits, after deducting all the expenses of carrying on the office—cost of employees, cost of advertising, cost of keeping the cars in the repair shop and garage, and the cost of everything incidental to the business—would be the measure of damages. It would be only Mr. F's net profits, after deducting all those matters. That could be considered as some measure of the profits which he might have made, but there are other things than those to be considered. Mr. L. testified that the year 19— was a very poor year in the automobile trade, and that he lost money. We have his testimony that the business was very slack in 19—, and there is no assurance that the plaintiff's business success would have gone on without interruption. Many things might have interfered by which the profits would have been affected, such as the cost of employees, the general costs of the business, etc. You can not tell what a man's profits are going to be in any year.

Mr L testified to the number of cars that he sold. The L. Co received 62 cars from the P M C Co, and they were the agents who succeeded Mr F. They got 62 cars, four of which remained unsold at the end of the year. They therefore sold 58 cars, but you will recollect that they had a very much larger selling force than the plaintiff had. You could hardly determine how large a number Mr F. could have sold with his force. We call your attention to these uncertainties. In approaching the question of damages, if you conclude to award damages to the plaintiff, you must consider all these matters. If you consider the plaintiff entitled to damages, you will award him such a sum as the evidence will fairly justify you in allowing him as his net profits, if he had continued in business at that place, down to the time when the new contract would have expired.<sup>1</sup>

#### Washington

If you find that the defendant accepted the order for the — car on its form No. 3501 upon the following condition: "This order is accepted subject to delays caused by conditions of material, fuel and labor markets, strikes, fires, transportation difficulties and other matters beyond the control of this company, rendering the performance of this contract commercially impracticable; it being understood that this company shall not be liable for loss or damage for its failure to deliver goods ordered," and that said acceptance containing said clause was sent to plaintiff company by defendant—you will return a verdict for the defendant.<sup>2</sup>

#### Wisconsin

It appears, gentlemen of the jury, that the defendant S., was a dealer in the — automobiles and trucks here at the city of Wausau, and that he ordered from the plaintiff, the M M Co, three — trucks, and gave a written order therefor on February 24, 19—. At the time of the giving of that order there was no price fixed on those trucks. The understanding was that the price should be fixed in accordance with the list or market price at the time of delivery of the trucks. The trucks were to be delivered promptly thereafter.

Now it also appears that the trucks were shipped from the factory at Detroit, directly to Wausau, and that at the time of the shipment there was forwarded to the First National Bank of this city a draft on Mr. S.—a bank draft, and with it a bill of lading, with directions that upon payment of the draft the bill of lading should be delivered to Mr. S. and he would there-

<sup>1</sup> French v Pullman Motor Car Co., 242 Pa 136, 88 A 876

<sup>2</sup> Smith v Cadillac Motor Car Co., 152 Wash 131, 277 P 453.

upon be enabled to secure and unload the trucks. It appears also that he paid the bank draft, secured his bill of lading, and then unloaded his trucks, and that that payment was made on March 7, 19— It also appears that in making that draft upon the defendant the plaintiff's representatives, at Detroit assumed that Mr. S. had already paid upon account of the trucks the sum of \$300, and that thereupon the draft was made, under that supposition, at an amount \$300 less than the list or market price of the cars at that time, and that if it had not been for that mistake the draft would have been drawn for \$300 more.

Mr. S., as it appears by the evidence, paid the draft, and received his cars. It is in dispute in this case whether or not he was informed, before he had gone any further than that, that there was a mistake in respect to the amount of the draft, and it is for this jury to decide in this case, from the evidence, how soon Mr. S. was informed, or had reasonable ground to believe or understand, that a mistake had occurred. If by the communications that passed between these parties, and by the draft and such other documents as you find were actually sent and delivered to Mr. S., Mr. S. was given reasonable ground to understand and believe that the draft which he paid was for the full amount of the cars, the full price, and if acting upon that belief he thereupon sold the cars without knowing there was any mistake about the amount charged to him therefor, and sold them on the basis of the amount which he had paid according to the draft and for a less amount than he would have sold them for in case he had known that the price on the cars was \$300 more than the amount of the draft,—in case he did all that, and before he received any information that reasonably brought to his attention the fact that the mistake had been made, then the plaintiff is estopped to claim any larger sum than the amount which they have demanded and have been paid.

But if, on the other hand, by reason of negligence on the part of the defendant, or by reason of inattention to the communications that he received, the defendant S. failed to understand and to see that the mistake had been made, or in other words, if the plaintiff M. M. Co. by their communications and draft and other documents forwarded to the defendant, gave the defendant reasonable ground to understand that a mistake had been made before the defendant had disposed of the trucks, then it was his duty to ascertain and determine for himself and find out whether a mistake had been made, and see that it was rectified before he took any steps to sell the cars for any sales price less than he would have sold them for in the event that he had paid the full market rate.

Now in case Mr S was misled to his injury by the communications and actions of the plaintiff, that is, misled by their communications and actions into believing that the draft was for the full price of the cars and all that he was to pay therefor, and before he learned of the mistake had sold the cars for less amounts than he would have sold them for if he had known of the mistake earlier, then the plaintiff ought not to recover in this action. But if, on the other hand, Mr. S had reasonable ground to believe from the communications made to him before he sold any of these trucks that there was a mistake, and that the real price of the cars was \$300 more than the amount that was specified in the draft, then he himself is responsible for his mistake, and the plaintiff is entitled to recover the amount that was by inadvertence and mistake omitted from the draft.

Now it appears that at the time of the purchase of these trucks the defendants had on deposit with plaintiff the sum of \$101 65. There is no dispute about that. It appears too that in the draft which was drawn upon him, and which he paid, there was included an item of \$36 00 for insurance which was not properly chargeable to him, and which has been credited back to him upon the books of the plaintiff. So that if the plaintiff is not entitled to recover in this case, then the defendant is entitled upon his counterclaim to recover from the plaintiff the amount of the deposit, and the amount which was paid by him for insurance improperly, a total of \$137 65.

But if the plaintiff is entitled to recover then the plaintiff is entitled to recover the sum of \$300 less the \$137 65 for which the defendant is entitled to credit, in other words, a balance of \$162 35.

So your verdict in this case will either be a verdict for the plaintiff for the sum of \$162 35, or it will be a verdict in favor of the defendant for \$137 65, depending upon your decision of the question whether the plaintiff is estopped in the manner in which I have indicated, to now claim a larger sum for the trucks than they claimed at the time when they made the draft upon the defendant.<sup>3</sup>

### § 301. Repairs, parts, and service generally.

#### Alabama

I charge you, gentlemen of the jury, that the vendor of an automobile which has placed its vendee in possession thereof

<sup>3</sup> Midland Motors Co v Schroeder,  
Circuit Court, Marathon County,  
Wisconsin



under a retention of title contract, knowing that repairs would be necessary in the natural course of events, does not thereby give implied consent to the vendee in possession to have repairs made <sup>4</sup>

#### Indiana

One who sells his services as repair man in the installation of repair parts in an automobile or one who sells repair parts for an automobile in the absence of a specific agreement to the contrary impliedly warrants that his services will be rendered in a workmanlike manner, and that such parts installed will be reasonably suitable for the purposes for which they are sold and installed. And if you find from the evidence that such services were performed in a workmanlike manner and that such parts installed and charged for were reasonably suitable for the purposes for which they were sold and installed and that such services and parts were of the fair and reasonable value charged by plaintiff then your findings should be for the plaintiff.

If, however, you find that such services and materials furnished by plaintiff to defendant were not workmanlike, and suitable for the purposes for which they were purchased and sold and that defendant has been damaged thereby, then your verdict should be for the defendant.

As to the several items of the plaintiff's claim for services, if you find for the plaintiff, it will be your duty to determine what, if any, services were performed, or moneys paid out by him, for the defendant as alleged. And it will be your duty to determine whether there was any contract as to the amount of payment, and if none was made you must then determine from the evidence the fair value of such services and the amount so due, and allow him such sum as you may find he is entitled to under the evidence and the instructions given you by the court, unless you further find for the defendant upon his cross-complaint in some larger amount.

If you believe from the evidence that at the time the automobile in question was delivered by plaintiff to defendant after the same had been repaired by plaintiff, the defendant paid plaintiff without protest, the sum of \$75 00 on account of such repair, then you may consider that fact together with all the other evidence in the case as bearing on the question of whether the estimate made by plaintiff of \$60 00 cost to defendant for the contemplated repair covered the cost of new parts needed in

<sup>4</sup> *Ellis Motor Co v Hibbler*, 219 Ala 53, 121 S 47.

the repair, as well as the cost of labor, or covered only the cost of labor.

If you find that any of the materials or parts sued for in this cause have not been paid for and that they, or any of them, were defective and not of the grade and quality ordered and promised, then the defendant will have the right to recoup, or deduct from the agreed price if, you find that there was such agreed price made, the damages which he has suffered by reason of their being inferior in grade and quality; and the amount of such damages will be the difference between the value of such materials in the condition they actually were, found installed in defendant's car and the value of them if they had been of the grade and quality impliedly promised by plaintiff; and this amount of damages if less than plaintiff's claim as proved should be deducted from the amount of such claim <sup>5</sup>

**Iowa.**

You are instructed that ordinary skill, as that term is used in these instructions, means that degree of skill which men engaged in that particular line of business usually possess and employ in doing such work; not that which belongs to only few men of extraordinary endowment and capacities, but such as is generally possessed by men engaged in the same kind of business, in and about the town of ———. <sup>6</sup>

**Wisconsin.**

(1) It appears that defendant left his Ford car at the plaintiff's garage for some repairs and overhauling, about the first of December, 19—, and that thereafter the plaintiff by his workmen did overhaul the car and replace with new parts a considerable number of old parts of the car.

The plaintiff claims the right to recover in this action the reasonable value of the work done and of the parts furnished in so overhauling and repairing the car. The net amount charged by plaintiff for the work and parts was \$106.47.

It also appears that plaintiff procured at the defendant's request an automobile license and paid therefor \$5.00 and also furnished him with an inner tube of the value of \$2 60, and that defendant has paid to plaintiff sums equal to those two items. So that you are concerned only with the question of how much became due plaintiff for the overhauling of and the furnishing of the new parts for the car. The amount claimed

<sup>5</sup> Wisenberg v Regan, Circuit Court, Marion County, Indiana, No. 36314

<sup>6</sup> Burrichter v Bell, 196 Ia 529, 194 NW 947

therefor is \$106.47. It appears that the amounts charged for said work and parts are reasonable in amount and correctly stated. But defendant claims that before he delivered the car at the garage for overhauling he made a special contract with plaintiff's agent therefor to the effect that plaintiff would overhaul, clean, and put in good order the engine of the car and furnish the material therefor for the sum of \$20 00, and that plaintiff would furnish a new windshield and repair the radiator for the reasonable value thereof, and that no other new parts should be put into the car without first consulting the defendant. This is denied by the witnesses for the plaintiff, and this presents the main issue for you to decide.

Your first duty will be to determine from the evidence whether the alleged special contract was made. If you find that it was made then the plaintiff can recover in this action only the \$20 00 plus the reasonable value of the new windshield and of the repair of the radiator, and plus the reasonable value of any other new parts, if any, which you find from the evidence the defendant directed to be put in.

It appears that the defendant with full knowledge that a new radiator was furnished and put on the car, accepted his car from the garage and used it, so that he thereby voluntarily accepted the new radiator and became liable to pay therefor, less a reasonable allowance for the old radiator. It is your duty therefore, in any event, to award to the plaintiff the net amount charged on account of the radiator, to wit, \$12.00.

In case you conclude that the alleged special contract claimed by defendant was not made, and that defendant merely directed a general overhauling and repairing of the car, then your verdict should be in favor of the plaintiff for the amount of plaintiff's demand.

The burden of proof is on the defendant to satisfy the jury to a reasonable certainty that the alleged special contract was made. If the evidence so satisfies you then you will conclude that the alleged contract was made. Otherwise you will conclude that it was not made.

Upon the issues and evidence as they now stand, it appears that your verdict must be in favor of the plaintiff for some amount. The size of the amount will depend mainly upon whether you find that the alleged special contract was made or was not made. A copy of the items constituting the account upon which the plaintiff sues is attached to the complaint, being made "Exhibit A," and for your guidance in considering this

case I will send with you to the jury room a copy of that statement.<sup>7</sup>

(2) The plaintiffs claim the right to recover of the defendant the sum of \$112 23 with interest thereon from November 1, 19— This is claimed to be a balance due upon an open running account set forth in "Exhibit 1" offered here in evidence. The defendant admits the correctness of all items entered on this account excepting the charge for services in tearing down and overhauling the defendant's automobile, procuring new parts, and reassembling and rebuilding the car. This charge therefor after it was reduced by a credit shown by the evidence amounts to \$100, and this is the amount which is in dispute in this action. The balance of \$12 23 claimed by plaintiffs is not disputed by the defendant. It is not disputed that the plaintiffs rendered the services for which this charge was made and that the charges therefor are reasonable provided the work done was skillful and workmanlike.

The defendant, however, claims that the service of tearing down and rebuilding the car was rendered by plaintiffs pursuant to an express agreement that if the defendant would buy the new parts necessary therefor the plaintiffs would tear down and rebuild the car using the new parts therefor and put the car in first class condition to the satisfaction of the defendant, and that if they did not succeed in doing this the defendant would not be charged anything for the labor and service involved.

The defendant further claims that the plaintiffs failed to put the car in first class condition although he furnished the new parts required and that therefore nothing became due the plaintiffs for that service.

The plaintiffs deny these claims of the defendant and you are called upon to decide these issues.

The burden rests upon the defendant to satisfy the jury to a reasonable certainty by the evidence in this case that the express agreement claimed by him was actually made and that plaintiffs failed to comply therewith. If the evidence so satisfies you then the plaintiffs can not recover the \$100 charged for in the account for the service of tearing down and rebuilding the car, and in such case your verdict will be in favor of the plaintiffs for only the balance of \$12.23 remaining after deducting the \$100, to which balance you will add interest from November 1, 19—

<sup>7</sup> Jacob v Christensen, Circuit Court, Lincoln County, Wisconsin

If on the other hand the evidence fails to so sustain the defendant's claims then your verdict will be in favor of the plaintiffs for \$112 23 with interest thereon from November 1, 19—<sup>8</sup>

(3) This suit is to recover upon plaintiff's bill against the defendant for labor and materials upon the repair of defendant's Buick car, in the spring of 19—

The plaintiff has presented his itemized statement of work done and materials furnished, and has testified that it is reasonable, and that the labor is charged for at \$1 00 per hour.

There is no dispute about the nature of the repairs made; but the defendant claims that he had a special bargain with the plaintiff, acting by his son R, that the repairs would not cost over half as much as the repairs cost upon the same car in the previous year. The defendant admits that this did not include the new fenders nor a new battery which the plaintiff was to supply and did supply as extras

Defendant admits that he should pay \$27 00 for the battery and \$19 95 for the new fenders, in addition to the amount which he claims was agreed upon for the other labor and material. Defendant also admits that he should pay \$2 00 for labor on his Ford car

Before you can consider whether there was a special bargain fixing the maximum amount for repairing the car you must decide whether the son R was authorized to bind the plaintiff by a special bargain as to price.

It appears that all arrangements that were made for the repair of the car were made with R and not with the plaintiff personally. The plaintiff denies that R. had any authority to make a special bargain for the repairs. If R had no such authority, then any bargain which he attempted to make would not bind the plaintiff

It is for the jury to say, from the evidence, showing the position which R occupied in the plaintiff's business and the duties which plaintiff entrusted to R., and the acts which were done by R with the plaintiff's knowledge, whether R was either expressly or impliedly authorized to make a special bargain, as claimed by the defendant. If you find that R. was so authorized, you should next consider whether a special bargain was actually made, and what the terms of it were.

<sup>8</sup> Van Vechten v Pettric, Circuit Court, Marathon County, Wisconsin

If there was an authorized special bargain, then the plaintiff has no right to recover any more for the labor and materials covered thereby than was provided for in the bargain.

If there was no authority of R. to make a special bargain, or if there was in fact no special bargain made fixing the price, or the maximum of the price, then the sole question for you to decide is how much was the labor and materials furnished reasonably worth

When work is done or materials furnished without any special bargain as to the price thereof, the one receiving the labor and materials is under obligation to pay the reasonable worth of the labor and materials.<sup>9</sup>

### § 302. Liability for injury to or destruction of vehicle.

#### Indiana

The court instructs you that a bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.

The person who delivers a personal chattel or chattels to another under circumstances coming within the definition of the term bailment is called the bailor, and the person to whom such chattel or chattels have been delivered is called the bailee.

A bailee of personal property for hire is not an insurer of the safety of such personal property while under his control. By this is meant, that he is not liable merely because such personal property sustains an injury or is damaged. He is liable, if at all, because he had done some act or thing with reference to the care of such personal property which an ordinarily prudent person similarly situated would not have done, or has failed to do some act or thing with reference to its care which an ordinarily prudent person, similarly situated, would have done. In other words, a bailee of personal property for hire is required to exercise such ordinary care and diligence with reference to the caring for such property to prevent injury

<sup>9</sup> Karas v Towle, Circuit Court,  
Marathon County, Wisconsin.

thereto while under his control that a person of ordinary prudence would have exercised in caring for property of the same kind, in the same situation and under the same or similar circumstances and conditions. He is required to exercise such ordinary care with reference to the property as an ordinarily prudent person engaged in the same business would have exercised under similar circumstances and conditions.

The court instructs the jury that if the plaintiff put the automobile in question into the possession of defendant at the request of defendant, and that any benefit, however slight, thereby resulted to the defendant, then the bailment would not be for the sole benefit of the plaintiff, but would be a bailment for mutual benefit, and the duty of the defendant would not be discharged by the exercise of slight care, but it would be a duty of defendant to exercise ordinary care for the protection of the automobile.<sup>10</sup>

#### Oregon

The court instructs the jury that if you find that the contract was as claimed by the defendant, that is, that the car was to be kept in the county garage, and at the owner's risk, the plaintiff is still entitled to recover if defendant was guilty of negligence. By negligence is meant the failure of defendant to exercise that care in protecting plaintiff's property that an ordinarily careful and prudent man would have exercised under the circumstances.<sup>11</sup>

### § 303. — Fires.

#### Indiana

The defendant, if it took charge of and undertook to care for plaintiff's property over night, as alleged in the complaint, was bound to use ordinary care to protect it against damage or loss, that is, that degree of care which would have been exercised by an ordinarily prudent person acting under the same or similar circumstances; but I instruct you in this connection that such ordinary care in the matter did not require defendant to anticipate the occurrence of or to provide means to protect the property against a fire that might originate without its negligence or fault, and that a reasonably prudent person acting under the same or similar circumstances would not have foreseen or anticipated. If you find from the evidence that the fire originated without fault or negligence on the part of the defendant, and its origin would not have been anticipated or

<sup>10</sup> Duckwall v Citizens Motor Car Co., Circuit Court, Marion County, Indiana, No 34990

<sup>11</sup> Pilson v Tip-Top Auto Co., 67 Or 528, 136 P 642

foreseen by a person of ordinary intelligence and prudence under the same or similar circumstances and conditions, then the defendant was only required to exercise ordinary care and diligence in its efforts to prevent injury to and save the personal property in question under the circumstances, after it knew or by the exercise of ordinary care should have known of the existence of the fire

In determining the question of whether the defendant in this case used reasonable and ordinary care for the protection of plaintiff's automobile, and in conducting its business, it is proper for you to take into consideration along with the other facts in the case, the kind and character of defendant's building construction, the kind and character of its machinery and equipment used in the conduct of its business, whether said machinery and equipment were of approved standard and suitable quality for the purpose for which it was being used, and whether the defendant conducted its business and used such machinery and equipment and its building with reasonable and ordinary care to protect the property of persons left in its charge. And if, after consideration of all these facts and circumstances shown by the evidence in the cause, you find that the defendant used reasonable and ordinary care in providing machinery and equipment in its garage and in the conduct of its business, with reference to the bailment of plaintiff's car, and that a fire occurred in its building without negligence on its part, then the defendant would not be liable for plaintiff's loss, if any was sustained, and your verdict should be for the defendant.

If the plaintiff is entitled to recover in this case, he can recover only upon the theory adopted in his complaint. The plaintiff has pleaded in his complaint and adopted the theory that the defendant was guilty of certain specified acts of negligence which caused plaintiff's damage. So, in order for the plaintiff to recover, the burden is upon him to prove by a preponderance of the evidence that the defendant was guilty of some one or more of the acts of negligence alleged in the complaint, and that said alleged negligence was the proximate cause of the fire and of plaintiff's damage, and if you should find that the fire had its origin in some act or cause not pleaded in the complaint, then it would make no difference whether such unpleaded act or cause was negligence on the part of the defendant or not, the plaintiff would not be entitled to recover, and your verdict should be for the defendant.

If you find from the evidence that plaintiff's automobile was placed with defendant for sale at the request of defendant, and that defendant was to receive a commission or other valu-



able consideration for selling said automobile, defendant would be a bailee for hire, and must use ordinary care in the protection of the automobile, and if you further find that there was a fire in defendant's place of business, as alleged in plaintiff's complaint, by reason of which plaintiff's automobile was damaged, and that plaintiff was free from any contributory negligence of any kind, then any failure on the part of the defendant to exercise ordinary care in preventing the origin of the fire would constitute negligence on the part of the defendant sufficient to make defendant responsible for the damage to plaintiff's automobile.

Where property in the custody of a bailee is accidentally destroyed by fire, without any negligence on the part of the bailee causing the same, the bailee is not liable for such loss, but the loss must be borne by the bailor. It is for you to determine however, from all the evidence in the case, whether defendant was negligent or not in the care of plaintiff's car and whether defendant or its agents acted in the care and protection of plaintiff's car as an ordinarily prudent person would have acted under the same or similar circumstances.

A garage keeper is not an insurer of automobiles left in his charge to be cared for. And where an automobile so left in the charge of a garage keeper is destroyed by fire, the garage keeper is not liable for the loss, unless it is established by a preponderance of the evidence that he was guilty of negligence in connection therewith and that such negligence proximately caused the fire and the resultant damage, if any, to plaintiff's car.

If you find from the evidence that the negligence of one R., or any other person than the defendant, and who was not connected with or employed by said defendant, was guilty of any negligence causing or contributing to cause the damage to plaintiff's automobile as alleged, and that such negligence was apparent, or in the exercise of ordinary care could have been observed and prevented by said defendant, or its employees, in charge of the garage at the time, and that notwithstanding said negligence of said R. or such other person, said defendant through its employee proceeded to handle gasoline in defendant's garage in a negligent manner, as alleged, and such negligence caused an explosion and ignition of said gasoline through and by means of which plaintiff's car was damaged, then the court instructs you that the defendant would be liable for plaintiff's damage, if any, providing plaintiff himself was not negligent,

and regardless of the negligence of the said R. or such other person.<sup>12</sup>

#### Wisconsin

It appears without dispute that a fire occurred in the defendant's garage and it burned to some extent and damaged a Studebaker automobile owned by one I. The automobile was insured by the plaintiff insurance company against loss by fire, and the plaintiff settled and paid the loss and received an assignment of any claim that I had against the defendant upon account of liability for causing the fire.

If, therefore, the defendant by himself or by any of his employees is legally liable in damages for causing the fire in question, then the plaintiff is entitled to recover the amount of damage done to the automobile by the fire in question.

The first question for this jury to decide from the evidence is whether the defendant, or any of his employees, caused the fire by negligence.

Negligence is the basis of liability if any liability exists.

When the car was brought to defendant's shop for work upon it, it was the duty of the defendant and his employees to use ordinary care and caution to do the car no damage.

Ordinary care on the part of the defendant and his employees under the circumstances means all such care and caution as are usually employed by competent automobile mechanics in doing work under the same or like circumstances. They were required to understand the nature of the tools and other means that they were using in doing the work, and the dangers therefrom that are ordinarily known and understood by competent careful automobile mechanics, and they were required to employ all such care and means in using those tools as are ordinarily employed to avoid damage by their use.

If the defendant or any of his employees failed to use that degree of care and skill and thereby produced the fire in question as a natural and probable result under such circumstances that an ordinarily prudent competent mechanic ought reasonably to have expected that some damage might probably be the result, then the defendant is legally liable for the damage done; otherwise he is not.

The burden is upon the plaintiff to satisfy the jury to a reasonable certainty by the greater weight of the evidence on the

<sup>12</sup> Duckwall v. Citizens Motor Car Indiana, No. 34990  
Co., Circuit Court, Marion County,

question that the defendant, or his employee was negligent and thereby proximately produced the damage. Until you are so satisfied, you can not properly return a verdict for the plaintiff. If you become so satisfied, it is your duty to return a verdict for the plaintiff

In case you find for the plaintiff, it will be your duty to assess the damages done to the car. <sup>13</sup>

#### § 304. — Damages.

##### Indiana

If you find from the evidence under the foregoing instructions, that the plaintiff is entitled to recover for damages to said automobile belonging to plaintiff, it will then be your duty to fix the amount of damages to which he is entitled. The measure of damages to the automobile will be the difference in its value immediately before and immediately after this alleged injury. <sup>14</sup>

##### Wisconsin

The rule for assessing such damage is to place a true valuation upon the car at the time when it was received into the shop and then the value—the true value of that car after the damage was done, and the difference between the two constitutes the damage resulting.

Evidence has been received here to show that parts of the car were damaged and what would be the probable cost of repairs. That was received only to assist you in forming a correct judgment as to the total amount of damages done. The cost of repairs may or may not be the amount of damage actually done to the car. The rule is, as I stated at the beginning, the difference between the value of the car just before the fire and its value immediately after the fire. <sup>15</sup>

<sup>13</sup> Northwestern Nat Ins Co v Grengs, Circuit Court, Marathon County, Wisconsin

<sup>14</sup> Duckwall v Citizens Motor Car Co., Circuit Court, Marion County,

Indiana, No 34990

<sup>15</sup> Northwestern Nat Ins Co. v Grengs, Circuit Court, Marathon County, Wisconsin

## CHAPTER 11

### OWNERSHIP, SALES, CHATTEL MORTGAGES, AND POSSESSION

Section		Section	
310	Ownership and possession generally	314	Fraud, misrepresentations, warranties, and promises of seller
311	Remedies under chattel mortgages	315	Compensation for use
312	Sales in general	316	Damages for unlawful detention
313	Remedies under contracts of sale		

#### § 310. Ownership and possession generally.

##### Alabama

(1) If B. for a sufficient reason made a tender of the Chevrolet car to C with a view of a rescission of any contract of exchange made, and C refused to receive it, B. had a right to abandon said car, if he saw fit.<sup>1</sup>

(2) A verbal gift of an automobile does not operate to transfer the property to the person to whom the gift is made until the custody, control, management, and use of the property passes from the giver to the person to whom the gift is made and is possessed by such person.<sup>2</sup>

##### Connecticut

Now, the law is so, that where an action of replevin is brought against what is called a bailee, or a person holding property in his custody, for the benefit of another person, and that person has notice of the suit, has an opportunity to appear and defend in it, and he does in fact appear and defend and make claim to the property and employs counsel for that purpose, or the same counsel who is acting for the plaintiff in the replevin suit also acts as counsel with the knowledge, acquiescence and approval of such plaintiff to defend the first replevin suit, the judgment in the former case is conclusive and binding upon all parties in the second case So that if the jury find that when the former action was brought against L & Co. and the company made no claim of title or ownership in itself to said property, but defended said case through the counsel of the plaintiff, \* \* \* whether such counsel was at the time actually under pay from this plaintiff, or of plaintiff's vendor, with the knowledge,

<sup>1</sup> Cornett v. Brooks, 206 Ala 566,  
90 S 787

<sup>2</sup> Feore v Trammel, 213 Ala 293,  
104 S 808

acquiescence and approval of the plaintiff, to protect the interests of the plaintiff in this case, and had an opportunity to appear, although nominally for the L Co., the plaintiff is bound by the judgment in the former case.<sup>3</sup>

#### Indiana

(1) If you find from the evidence in the case that the automobile in question is owned by both plaintiff and defendant, that is, that both parties have a joint interest or ownership in it, then in such event either one would be entitled to the possession of it and your verdict should be for the defendant.

If the jury finds that the possession of the personal property involved herein, was lawfully obtained originally by the defendant, and that no demand for the surrender of said property by the plaintiff was made prior to the filing of this suit, then I instruct you that your verdict should be for the defendant.<sup>4</sup>

(2) The fact, if you find it to be a fact, that the plaintiff, about August 1, 19—, delivered the possession of his certificate of title to said automobile and an ignition key to said automobile to said M. F S, Inc., but that the plaintiff retained said automobile in his possession and under his absolute control, the delivery of such certificate of title and ignition key would not constitute a valid pledge of said automobile, nor affect the title of the plaintiff thereto.<sup>5</sup>

### § 311. Remedies under chattel mortgages.<sup>6</sup>

#### Idaho

A material alteration of a chattel mortgage, by one of the parties thereto without the knowledge or consent of the other, after execution and delivery thereof, so as to include property therein not included in the mortgage, destroys the lien of the mortgage and right to foreclose the same.<sup>7</sup>

#### Kansas

If you should find from the evidence that the property in controversy was sold and transferred by the defendant J. S J. to defendant C., and that said automobile was delivered to her prior to the execution of the mortgage upon which plaintiff bases his claim, and prior to the recording of said mortgage, and that

<sup>3</sup> *Ladany v Assad*, 91 Conn 316, 99 A 762

<sup>4</sup> *Laraway v Laraway*, Circuit Court, Marion County, Indiana, No 39184, Instructions, 1926-28, p 27

<sup>5</sup> *Automobile Underwriters, Inc. v.*

*White*, 207 Ind 228, 191 NE 335

<sup>6</sup> See also Chapter 49, Chattel Mortgages

<sup>7</sup> *Peterson v Hailey Nat Bank*, 51 Idaho 427, 6 P2d 145

the defendant C had no knowledge or notice of the existence of such mortgage at the time she took said car, then the claim of the plaintiff under said mortgage would be void as against the defendant C., and in such event your verdict should be for the defendant C. <sup>8</sup>

#### Maryland

The jury is instructed that if they find that on or about the months of July and August, 19—, the defendant (acting by virtue of a fieri facias issued out of one of the law courts of Baltimore City directing the said B, as sheriff of Baltimore County, to levy on the property of one C H. C ), seized and sold a Ford sedan, the property of the plaintiff, by virtue of a duly recorded mortgage in default of payment, and if they further find that the said B had actual as well as constructive notice of such mortgage arising from the recording thereof and further find that the said B. sold to one L., who took possession thereof and transferred it to others who are now claiming the said automobile, then their verdict must be for the plaintiff. <sup>9</sup>

#### § 312. Sales in general. <sup>10</sup>

##### Arkansas

The question submitted for your consideration is whether there was a sale of the car in question by plaintiff, E. J. C, to the defendant, J. P. H. To constitute a sale, there must have been an agreed price between the plaintiff and the defendant, and if you find there was an agreed price and the defendant, or his agent or agents, if you find there was an agency, actually received the car, you should find for the plaintiff.

You are instructed that before the plaintiff can recover in this case, he must show that a delivery was made on the part of the plaintiff and that an actual acceptance was made on the part of the defendant, and you are to consider any and all facts and circumstances proved in this case in arriving at the intentions of the parties to this suit

You are instructed that the defendant could receive the car by agent as well as in person, and if the defendant actually received the car, you should find for the plaintiff. <sup>11</sup>

##### Washington

The terms of a contract must be definite and ascertainable. Neither the court nor the jury can create a contract or create

<sup>8</sup> Warner v Carter, 109 Kan 285, 198 P 960

<sup>9</sup> Burton v. Jennings, 158 Md 254, 148 A 424

<sup>10</sup> See also Chapter 154, Sales of Goods

<sup>11</sup> Chalfant v Haralson, 176 Ark 375, 3 SW2d 38

terms of a contract where the parties to the contract have failed so to do. If any element essential to the contract has been omitted or is incapable of ascertainment, the contract is invalid and unenforceable.

The alleged contract involved in this case is a contract for the purchase and sale of an automobile. The minimum essential requirements of such a contract are an agreement as to the automobile to be sold, the purchase price, and the method and terms of payment. If another automobile is to be given in part payment, it is essential that the parties agree, first, upon the acceptance of such other automobile as part payment, and second, upon the value of such other automobile to be credited upon the purchase price.<sup>12</sup>

**Wisconsin.**

By the word "owner" is meant the person who holds the legal title to such a vehicle. It is the law that two persons may sell and buy an article of personal property such as an automobile, by what is known as an oral contract, and if the seller's and buyer's minds have met upon the price and all of the essential terms of the contract of purchase, and thereafter the article is delivered by the seller and accepted unconditionally by the buyer, that contract constitutes a sale. The question of whether or not there has been any payment is not material as to making the sale legal. It may be considered as evidence of sale because where there has been a delivery and the value of the property sold is above the sum of fifty dollars, it does not come under the statute of frauds.

Now, it is the contention of the defendant insurance company in this case that at the time of this accident—the day before, these parties, W. and S., met and agreed upon a price for this automobile, that the following day the car was delivered to the defendant W. in pursuance of that agreement and accepted by him. You are instructed that in arriving at your decision and in making your answer to question number one [was S. still the owner?], you are to consider whether or not the minds of the witness S. and that of the defendant W. met on all the conditions of the sale of the automobile prior to the time of the collision. If you are convinced by a preponderance of the credible evidence that the price had been fully agreed upon, that \$18.82 thereof had been paid down, and that the automobile was delivered to the defendant W. pursuant thereto,

<sup>12</sup> Pettaway v Commercial Automobile Service, Inc., 49 Wash2d 650, 306 P2d 319

then you will answer the question "No," that is, that S. was not the owner of the automobile

If you are not so convinced and if you believe from the testimony that something remained to be done, such as arranging the refinancing of the car, or if you believe that the defendant W was using the automobile on a trial run and that the sale had not been closed subject to that trial run, then you will answer this question "Yes."<sup>13</sup>

### § 313. Remedies under contracts of sale.

#### Alabama.

(1) If you find from the testimony that plaintiff got possession of that car under an agreement that the repossession of the car was taken in full satisfaction of all money due on the purchase-price of the car, and under an agreement got possession of the car, and, after he had possession of it, defendants discovered that he was making a different contention and undertook to take their car, and plaintiff prevented them from doing so and gave them a different memorial or statement of the contract of delivery which did not conform to the original agreement under which plaintiff got possession of the car, and defendants at the time announced that that was not the agreement, and would accept the paper as an acknowledgment that they had delivered the car to him, but would not pay the notes, then that receipt would not be binding

The court charges the jury, if you find from the evidence to your reasonable satisfaction that the plaintiff took the car and agreed to cancel the past-due notes, your verdict should be in favor of the defendants<sup>14</sup>

(2) I charge you, gentlemen of the jury, that if you find from the evidence that the defendant had complied with all of the agreements made by and between the plaintiff and the defendant, up to and including the date when said trucks were removed from the possession of the defendant, then the defendant was not in default, and your verdict should be for the defendant<sup>15</sup>

(3) Now, there was some evidence introduced in here in regard to some insurance in this case That matter was submitted to you for your consideration for only one purpose, that is, to show any statement made by the plaintiff in this case in

<sup>13</sup> Reynolds v Wargus, 240 Wis House, 216 Ala 666, 114 S 60.  
94, 2 NW2d 842

<sup>15</sup> Bugin v Stewart, 216 Ala

<sup>14</sup> McCarty-Greene Motor Co v. 663, 114 S 182.



regard to the value of that automobile You have no interest or concern, and neither has the defendant in this case, as to who received any insurance or as to who paid any insurance or that any insurance was paid or received This jury has no interest or concern in that and neither has the defendant any interest or concern in that. <sup>16</sup>

#### Georgia

I charge you further that should you find from the evidence that at the time the F. R. M. C. Co. traded with D. that there was a retention of title contract on record in the clerk's office in this county, covering a car of a similar description, with the exception that there was a difference of one figure in the number of the car—that there was a similarity in the two numbers to such degree that it would put the F. R. M. C. Co. on notice to make an investigation to see whether or not the car he was trading for was one and the same car as that other which F. held a retention of title for, and that he didn't exercise the proper care and diligence in determining whether or not that was the same car over which F. held the retention of the title contract, I charge you as a matter of law that he took the security over the car with notice of the F. lien. <sup>17</sup>

#### Indiana

(1) I instruct you that the plaintiff would be entitled to possession of the truck in question if you find defendant failed to make payments as agreed to by him or failed in complying with any of the terms of the contract, but I further instruct you that if you should find that plaintiff is entitled to the possession of the truck in question, that such finding will not operate to prevent defendant from procuring a recovery on his cross-complaint, if you also find the material allegations of his said cross-complaint to be true.

I instruct you that under the allegations in this complaint, the plaintiff had a right to retain the title to the property in question, pending the full payment of the agreed price between the parties, and if you find from a fair preponderance of the evidence that plaintiff did so retain title to the property by means of the contract introduced in evidence herein, conditioned upon certain monthly payments from defendant to plaintiff, and that defendant did not fulfil his agreements in such contract with reference to future payments or any of them, and that plaintiff made demand upon defendant for the return of said truck prior to the beginning of this action, then and in that

<sup>16</sup> Ewart v. Cunningham, 219 Ala. 399, 122 S. 359.

<sup>17</sup> Flint River Motor Car Co. v. Farrar, 48 GaApp 150, 172 SE 97.

event you should find for the plaintiff on its complaint, but should you further find that defendant has proved by a fair preponderance of the evidence his allegations of fraud and rescission as outlined in his cross-complaint, in that event your finding should be for the defendant on the cross-complaint, and in such amount as under all the evidence he is entitled to.<sup>18</sup>

(2) It is the law in this state that the assignee of an unperformed contract takes the same rights and equities as his assignor, but no more, and that a party to a contract has the same defenses to the contract in the hands of an assignee that he had originally. And I instruct you that under the allegations in this complaint if you find that there was a duly executed assignment of the contract in question, the plaintiff had a right to retain the title to the property in question, pending the full payment of the agreed price between the parties, and if you find from a fair preponderance of the evidence that cross-defendants and plaintiff did so retain title to the property by means of the contract introduced in evidence herein, conditioned upon certain monthly payments from defendant M. to plaintiff, and its assignors H. and R., and that defendant M. did not fulfil his agreements in such contract with reference to future payments or any of them, and that plaintiff made demand upon defendant M for the return of said car prior to the beginning of this action, then and in that event you should find for the plaintiff on its complaint, but should you further find that defendant M. has proved by a fair preponderance of the evidence his allegations of fraud as outlined in his cross-complaint, in that event your finding should be for the defendant and cross-complainant, and in such amount as under all the evidence he is entitled to.<sup>19</sup>

(3) It is the law that in case of an injury to a motor vehicle sold under a conditional contract of sale, that the vendee having possession of said car, who would be the plaintiff herein, has the right to maintain an action against a third person for the injuries to the machine.<sup>20</sup>

**Iowa.**

(1) It is the claim of the defendant, J. H., that he purchased the car in controversy from the H. M. Co. without actual knowledge of any conditional sales contract for the sale of said car which was held by plaintiff and that he paid full value therefor.

<sup>18</sup> Partlow-Jenkins Motor Car Co. v Hubbard, Circuit Court, Marion County, Indiana, No 30329.

<sup>19</sup> Atlas Securities Co v. Mar-

shall, Circuit Court, Marion County, Indiana, No 36816.

<sup>20</sup> Craig v Lee, 81 IndApp 319, 142 NE 399

If you find that said car was actually sold to the said L. W. A. by said H. M. Co., which contract was filed for record with the city clerk of the city of Minneapolis, Minnesota, before defendant purchased said car, defendant was bound to take notice of said conditional sales contract and plaintiff's rights thereunder, unless you find that plaintiff is estopped to assert said claim as set forth in the preceding instruction.

If you find that the said H. M. Co. in good faith sold the car in controversy to the said L. W. A. and that a conditional sales contract covering said car was executed and delivered to said H. M. Co., and was by them duly assigned and delivered to plaintiff and was then only filed for record in the office of the city clerk of the city of Minneapolis, Minnesota, then such contract when so filed was notice to all of the world of the interest plaintiff held in said car, and even though you find defendant paid full value for said car covered by said contract, he would not be protected against plaintiff's claim thereon, unless you find that plaintiff waived said terms of said conditional sales contract as heretofore set forth herein.<sup>21</sup>

(2) By the term "notice" as used in these instructions is meant either knowledge of the fact in question or means of knowledge of such fact.

By means of knowledge is meant information as to facts which would put a prudent man on inquiry which if prosecuted with ordinary diligence would lead to actual knowledge of the fact in question.

In this case if the defendant at the time of the purchase of said automobiles or after purchase and before paying value therefor had knowledge of the right and title of the plaintiff thereto, or if, at either such times, he had information as to facts which would put a prudent man on inquiry, which if prosecuted with reasonable diligence would have led to actual knowledge of plaintiff's right and title to said automobiles, then defendant had notice within the meaning of the law. But, if he had neither such knowledge nor such means of knowledge then he did not have notice.<sup>22</sup>

### § 314. Fraud, misrepresentations, warranties, and promises of seller.<sup>23</sup>

#### Indiana.

(1) I instruct you that when a party claims to have been deceived by misrepresentations or fraud perpetrated by another

<sup>21</sup> Commercial Credit Co. v Hazel, 214 Ia 213, 242 NW 47

Corp v Whiteley, 217 Ia 998, 252 NW 779

<sup>22</sup> General Motors Acceptance

<sup>23</sup> See also Chapter 96, Fraud

in the purchase of property and thereafter treats the property as his own after knowledge of such misrepresentations, he is held to have waived his right to rescind. So, in this case, if you find that plaintiff actually deceived the defendant in the sale of the truck in controversy, and find further that the defendant discovered such misrepresentations, but notwithstanding such discovery, you further find that he thereafter used this truck as his own, he will thereby be held in law to have waived his right to rescind and he can not recover on his cross-complaint, and will be held to have affirmed the contract, unless you should further find that from his acts and conduct, said defendant did with reasonable promptness disaffirm and rescind the contract in question, in which event your finding should be for defendant.

The court instructs the jury that the contract for the alleged breach, of which this suit is brought, is what is known in law as a "conditional contract of sale," the title to the property sold to remain in the seller until the purchase-price is paid. Such a contract is valid in law and may be enforced according to its terms. Under such a contract, the defendant and purchaser has no right to rescind the sale excepting in case of fraud or misrepresentation made by the seller in order to induce the purchaser to buy. In the event there were no such fraudulent representations, the court instructs the jury that the plaintiff had the right to repossess the ABC truck asked for and taken under replevin herein. But on the other hand, if the jury find from the evidence that said contract was procured by the fraud and misrepresentations of plaintiff as charged in the defendant's cross-complaint, then and in that event, the plaintiff was not entitled to take advantage of his own fraud, if you find there was a fraud, and to take in this proceeding, the ABC truck, and at the same time, retain the amount paid by the cross-complainant, if you find that certain sums and property were so received and retained, to wit: \$200 in cash and \$700 in the XYZ truck.

If you believe, from a fair preponderance of the evidence, that at the time of the sale of the ABC truck to the defendant, that the plaintiff or its agents represented to the defendant and cross-complainant that the ABC truck was a new truck and in perfect condition, that the defendant believed such representations and relied thereon, and had no knowledge to the contrary, and that the ABC truck was not a new one, but had in fact been in use by the plaintiff for some time prior thereto, or was a second-hand one, then I instruct you that the defendant had the right, upon discovery of these facts that the ABC truck was not a new one, but had been in use for some time prior thereto.

and injured, to rescind the contract, and to demand the return of the cash paid thereon, including the XYZ truck or its value, upon the return to the plaintiff of the ABC truck taken in the replevin proceedings herein <sup>24</sup>

(2) I instruct you that if you find that defendants H. and R. duly assigned and transferred their contract to plaintiff, plaintiff would then be entitled to possession of the car in question if you further find defendant failed to make payments as agreed to by him or failed in complying with any of the terms of contract, but I further instruct you that if you should find that plaintiff is entitled to the possession of the car in question, that such finding will not operate to prevent defendant from procuring a recovery on his cross-complaint, if you also find the material allegations of his said cross-complaint to be true

It is the law in this state that the assignee of an unperformed contract takes the same rights and equities as his assignor, but no more, and that a party to a contract has the same defense to the contract in the hands of an assignee that he had originally. And I instruct you that under the allegations in this complaint if you find that there was a duly executed assignment of the contract in question, the plaintiff had a right to retain the title to the property in question, pending the full payment of the agreed price between the parties, and if you find from a fair preponderance of the evidence that cross-defendants and plaintiff did so retain title to the property by means of the contract introduced in evidence herein, conditioned upon certain monthly payments from defendant M. to plaintiff, and its assignors H. and R., and that defendant M. did not fulfil his agreements in such contract with reference to future payments or any of them, and that plaintiff made demand upon defendant M. for the return of said car prior to the beginning of this action, then and in that event you should find for the plaintiff on its complaint, but should you further find that defendant M. has proved by a fair preponderance of the evidence, his allegations of fraud as outlined in his cross-complaint, in that event your finding should be for the defendant and cross-complainant, and in such amount as under all the evidence he is entitled to. <sup>25</sup>

(3) The defendant in this case has averred and sought to prove by evidence that the contract which plaintiff admits having signed, contained in letters stamped diagonally across the face

<sup>24</sup> Partlow-Jenkins Motor Car Co  
v. Hubbard, Circuit Court, Marion  
County, Indiana, No. 30329

<sup>25</sup> Atlas Securities Co. v. Mar-  
shall, Circuit Court, Marion County,  
Indiana, No. 36816.

of the contract, the following language "This car herein described is bought in 'AS IS' condition and buyer agrees that no representations have been made that are not stipulated within this contract."

It is for you to determine from all the evidence in the case whether such written condition was upon the contract at the time plaintiff signed it, and further, what was the meaning of such stamped condition and what the parties intended thereby, if you find such stamped agreement was there at the time plaintiff signed it <sup>26</sup>

#### Kentucky

The court instructs the jury that if you believe from the evidence in this case that on or about April 18, 19—, plaintiff, W P R, purchased from the defendant, M. M P. Co., through its agents, J W B and W A., or either of them, a farm tractor mentioned in the evidence, and that said agents in making the sale to him were acting for and on the behalf of the defendant in making said sale, and then and there, in order to induce the plaintiff to purchase said tractor, and as part of the contract of sale and purchase, warranted that it would draw two 14-inch plows when plowing or fallowing land for cultivation, and that it would draw or pull a double 16-inch 12-disc harrow when ordering or fallowing the land, and that it would develop and maintain 6 horse power traction on its draw bar when used for plowing or harrowing land, and would develop 12 horse power on belt when used for the purpose of propelling or operating other machinery or appliances in said manner, and would maintain said power regularly and for a reasonable length of time, and that it would do good work and such work as is ordinarily done with farm tractors, and that defendant would keep and maintain said tractor in good working and operating condition so that same would at all times perform said services for a period of one year, and shall further believe from the evidence that the plaintiff relied upon said guaranties and representations in the purchase of said machine, and was thereby induced to purchase the same, and shall further believe from the evidence that said guaranties and representations, if any, were untrue, and that said tractor was not suitable or capacitated to do the work herein specified, and that it was without value for the purpose for which it was purchased, then you will find your verdict in favor of the plaintiff, but unless you so believe, you will find in favor of the defendant <sup>27</sup>

<sup>26</sup> Beldon v Goldberg, Circuit Court, Marion County, Indiana, No 37248

<sup>27</sup> Missouri Mohne Plow Co v Render, 199 Ky 773, 251 SW 977

**Missouri**

The court instructs the jury that if, in order to induce defendant to purchase said tractor, the plaintiff represented and stated to defendant that said tractor would do his work, and do it right, the plaintiff being informed of the use which the defendant intended to put it to, and that it would do defendant's work right, then you should find the issue for defendant.<sup>28</sup>

**Washington**

If a seller states as true, material facts to a buyer who relies thereon to his injury, the seller can not recover by showing that he did not know that his representations were false, or that he believed them to be true, or that he intended no wrong. The result to the buyer would be the same in either event, if he relied and acted upon false representations regardless of the knowledge, lack of knowledge, or intent of the seller. The affirmation of what a seller does not know to be true, in law, is equally as unjustifiable as the affirmation of what such seller knows to be false.<sup>29</sup>

**Wisconsin**

(1) The first question is this:

At the time of the sale of the car by the plaintiff to the defendant, on or about January 5, 19—, was the sale accompanied by a warranty continuing for 90 days, that the car was free from substantial defects in material and workmanship?

The contract of sale of the car was mainly in writing, and that contract is submitted in evidence. It is incomplete in respect to the warranty referred to in it. It provides that the car is sold under the standard warranty of the maker. What the standard warranty of the maker is does not appear in any writing or printing, and the witnesses have attempted to state what it contains. The defendant's contention is that the warranty contains the terms stated in the first question.

The plaintiff claims that the warranty was quite different and of such a nature that it did not unqualifiedly warrant the car to be free from substantial defects in material and workmanship. This question submits to you to decide whether the warranty was in substance and effect as claimed by the defendant.

The sale here in question was of a new automobile of a particular model and make, well known in the market, and unless there was something in the contract of sale to the con-

<sup>28</sup> *Adams v. Hughes* (MoApp),  
235 SW 168

<sup>29</sup> *Bass v. Logan*, 183 Wash 1, 48  
P2d 210

trary, the sale of such a new car would carry with it the implied warranty that the car sold was of the kind and quality and in as good condition, mechanically, as new cars of the same model and design and make ordinarily were in at the time when sold.

The second question is this.

If you answer the first question "Yes," then answer this:

Was said car in a substantial degree defective in material and workmanship when delivered to the defendant?

Notice that you are not to answer this question at all unless you answer "Yes" to the first question. In case, by your answer to the first question, you find the car was warranted as set forth in the first question, then you are here to find whether that warranty was broken in a substantial degree by reason of the car being defective in material and workmanship, when the car was delivered to the defendant.

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The fifth question is this.

When the defendant signed and delivered the renewal note, "Exhibit 3," on April 5, 19—, did he do so upon a promise from plaintiff, through his agent, that the plaintiff would either provide the defendant with a new car or a new engine in the car already delivered?

It appears that on April 5, 19—, the first \$300 note given by the defendant was due and payment of it was demanded. The defendant then gave the new \$300 note received in evidence, and he claims that he did so because defendant's agent, P., then promised that plaintiff would provide the defendant either with a new car or a new engine for the car already delivered. You are to say, from the evidence, whether such a promise was made in such a way as to bind the plaintiff.

In order to answer this question "Yes" you must be satisfied that the alleged promise was made by P., and that P. then had authority as agent for the plaintiff to make the promise.

It appears that P. was the agent of plaintiff in making the original sale of the car to the defendant, and that he went to the plaintiff to procure the renewal note on April 5, 19—, as plaintiff's agent. Under the circumstances shown by the evidence, is it reasonable to infer that P. had authority from the plaintiff to make the promise which defendant claims was then made? In case you find that the alleged promise was made and that P. was authorized to bind plaintiff by such a promise, then, and only then, you may answer this question "Yes."<sup>30</sup>

<sup>30</sup> Tisch v Siewert, Circuit Court,  
Marathon County, Wisconsin.



(2) The first question is this:

Was the defendant's road and bridge committee induced to give the order for the tractor in question because of representations by plaintiff's agent that the tractor would be capable of successfully doing the road patrol work for which it was to be purchased?

You have heard the argument of counsel upon this, and they do not seem to be very much in dispute as to how this question should be answered. However, it is for the jury to answer it from the evidence, and only in case the evidence on this question, all fairly considered, satisfies you to a reasonable certainty that it should be answered affirmatively are you authorized to so answer it. If you do not become so satisfied you are to answer it "No."

The second question is this:

If you answer the first question "Yes," then answer this: Was said tractor incapable of successfully doing said road patrol work?

You will notice that you are not to answer the second question unless you answer "Yes" to the first question. But in case you do answer "Yes" to the first question, then answer this one.

In considering this question, you should assume that the tractor that you have under consideration is in good mechanical condition—I mean by that, free from any defects of material or defects in workmanship in its manufacture, and you are to answer the question whether, when in that condition, it was incapable of doing the road patrol work in question. The fact that upon the first trial, a burr came off of some part of the machine, and as a result thereof, there was a breakdown which necessitated a repair, does not show that the tractor was incapable of doing the road work. That was merely a small defect in manufacture which, when remedied, would probably not recur again and had nothing to do with the capacity of the tractor. Neither would the fact that the magneto was found to be defective and had to be replaced, be sufficient to show that this tractor was incapable of doing the work, because that was another defect of manufacture, which was capable of repair.

The question is whether the tractor, when in good order, free from defects in material or workmanship in its make, was incapable then of doing the work for which it was proposed to be purchased. That is your question. You are to consider all of the evidence on the question, and in case the evidence satisfies you all affirmatively that this question should be answered "Yes," then you will so answer it. Otherwise you should answer

it "No" I think that is all I need say to you. These questions are easy of understanding otherwise and no extended instructions would be of any assistance to you <sup>31</sup>

(3) In this case, there is no dispute about the fact that in the fall of 19—, the defendant, H. B Co, sold and delivered to the plaintiff, C. M., a tractor, known as a — tractor, to be used upon the plaintiff's farm, and that the defendant, at that time, represented to the plaintiff that the same was a first-class tractor, capable, with proper management, of doing plaintiff's farm work

Now the plaintiff claims that said tractor was not as it was represented, that it was not a first-class tractor, and that it was not capable, with proper management, of doing the farm work, and that in fact it was of no value, and that, therefore, he was greatly damaged by reason of such sale to him under what he claims to have been misrepresentation.

The defendant insists that the tractor was in all respects as represented, and that, therefore, the plaintiff has no lawful or just claim against it for damages. In order to present these issues to the jury, two questions will now be submitted.

The first question is this:

Was the tractor which defendant sold to the plaintiff a first-class tractor and capable, with proper management, of doing plaintiff's farm work?

This question presents the main dispute of fact in the case. The burden of proof is upon the plaintiff to satisfy the jury to a reasonable certainty, by the evidence in the case, that the tractor in question was not a first-class tractor and that it was not capable, under proper management, of doing plaintiff's farm work. All I can say to you is that you should carefully consider the whole evidence, and if the evidence clearly and satisfactorily establishes that in any substantial degree, the said tractor was not a first-class tractor, or that it was not capable with proper management of doing plaintiff's farm work, then you should answer this question "No." If the evidence fails to so satisfy you, you should answer the question "Yes."

The second question is this:

If you answer the first question "No," then answer this:  
What was the difference between the value of said trac-

<sup>31</sup> Shaw-Enochs Tractor Co v.  
Oneida County, Circuit Court, Oneida  
County, Wisconsin.

tor as it was represented by the defendant to be and its actual value in the condition in which it was, with the addition of the new magneto later put on?

You will observe that if you answer "Yes" to the first question, then you need not answer the second question. But if you should answer "No" to the first question, then it will be necessary for you to answer the second question. In answering this second question, if you come to that duty, you will consider first, what would have been the actual value of the tractor if it had been a first-class tractor, capable, with proper management, of doing plaintiff's farm work, and having determined this, then you should determine from the evidence what was the actual value of the tractor in the condition in which it actually was when sold with the addition thereto of the new magneto which was later put on, and the difference between these two values will be the proper answer to this question.

The time referred to in this question is the time when the tractor was sold and delivered. There is evidence relating to alleged troubles in the operation of the tractor which arose later, and particularly in relation to the breaking of a bearing box and connecting rod in one of the cylinders, and of the crank-case of the engine at a still later date. If these later troubles were the result of defects in the tractor existing at the time of the sale, then you are to take these into consideration as affecting the value of the tractor at the time of the sale. If, however, these later troubles arose out of mismanagement, or failure to properly care for and manage the tractor, on the part of the plaintiff, then they should be left out of consideration in determining what was the actual value of the tractor in the condition in which it actually was at the time of the sale.

The plaintiff claims that at the time of the sale to him the defendant guaranteed that the tractor would do his farm work without trouble, for five or six years. The defendant denies that any such guaranty was made. The court does not find it necessary to determine in this action whether such guaranty was or was not given, and therefore no question in relation thereto is embodied in the verdict.<sup>32</sup>

(4) It appears without dispute, that on July 21, 19—, the defendant, B, went to Chicago and bargained with the plaintiff, T. M. Co., to buy a used automobile; that he paid \$100 in cash and gave his note and chattel mortgage for the balance

<sup>32</sup> *Muskowski v. Healy-Brown Co.*,  
Circuit Court, Marathon County,  
Wisconsin

of the \$1,150 on the purchase-price, and also gave plaintiff his sight draft on the Marathon County Bank for the same sum, \$1,150, for the purpose of paying the full purchase-price of the car, and that thereupon he drove home to Wausau with the car, that later he stopped payment of the draft at the Marathon County Bank and returned the car to the place of business of the plaintiff, in Chicago, on July 24, 19—, and demanded back his note and mortgage and bank pass-book and the \$100 which he had paid in cash on the purchase-price, and that the same have not been given back to him. Thus far, the facts are undisputed, and as to these the jury need make no finding. But the defendant claims that he was induced to purchase the car by misrepresentation of fact, and this is in dispute, and it is the duty of the jury to determine what the facts are in regard to this particular controversy.

The first question is

Did plaintiff, T. M. Co., as an inducement to defendant B. to buy the car in question, make any of the following alleged representations of fact,

- (a) That the car was a 19— model?
- (b) That the car was in first-class condition?
- (c) That the car would run 14 to 16 miles on an average of one gallon of gasoline?

After each one of these divisions of this question there is a place for you to insert your answer.

The second question is

If, in answer to the first question, you find that any alleged representation was made, then was the same untrue,

- (a) As to model of car?
- (b) As to first-class condition?
- (c) As to miles per gallon of gasoline?

After each one of these divisions of this question there is a place for you to insert your answer.

The third question is.

If you find that any of the alleged representations were made and were untrue, then was the same a material inducement to the defendant B. to buy the car?

These are the three questions for your consideration and answer.

Now in respect to the third question which inquires in case any misrepresentation was made, whether the same constituted a material inducement to the defendant B. to buy the car, you

are instructed that it was the duty of the defendant B. in bargaining for the car in question, to pay attention to the business in hand and to the car which he was bargaining for, and to see and observe the character, kind, and condition of the car so far as the same was open to be seen and to be known to him, in case he paid ordinary attention to the car and to the business in which he was engaged. As to anything which he knew, or which by giving ordinary attention to the business in hand he ought to have observed and known, he can not claim that he was deceived and he can not be permitted to claim that he was induced to make the purchase by any misrepresentation about anything about which he knew, or which by ordinary attention he ought to have known, the true condition.

In order to constitute a material inducement to the defendant to buy the car, the misrepresentation, claimed and proved to have been made, must be of some fact of sufficient importance to constitute a real reason to him to make the purchase, and of such a nature that the defendant did not know, and could not, by reasonable attention to the business in hand, have learned the truth about it <sup>33</sup>

(5) It appears without dispute that on May 19, 19—, the plaintiffs, acting by the plaintiff W., sold a second-hand automobile to the defendant for the sum of \$150, and the note sued upon in this action was given by the defendant for the purchase-price.

The defendant is liable to pay the note unless the purchase of the car was brought about by means of false and fraudulent representations of the plaintiffs in respect to the condition of the car.

The first question is this:

Did the plaintiff, W., as an inducement to the defendant to buy the automobile in question, state as a fact to the defendant,

- (a) That the car had been shortly before completely overhauled and was in good running condition?
- (b) That the engine did not pump or leak oil?

A space is left after each of these two propositions for your answer, and you will answer "Yes" or "No" to each of these propositions accordingly as you find from the evidence.

<sup>33</sup> Tennant Motor, Ltd v Bluhm,  
Circuit Court, Marathon County,  
Wisconsin.

That presents a simple question of fact as to whether either or both of these statements were made by the plaintiff as an inducement to the defendant to buy the car.

The second question is this

If you answer "Yes" to either of the subdivisions of the first question, then answer this. Were the statement or statements which you so find to have been made, untrue when made?

You see you will not answer this question unless you answer "Yes" to either one of the two propositions, or both of the two propositions in the first question. But if you answer "Yes," and find that the statement or statements were made, then you are here to answer whether those statements were untrue.

The third question is this

If you answer "Yes" to the second question, then answer this. Were the statement or statements thus made by the plaintiff W. relied on by the defendant and did they materially induce defendant to purchase the car?

The defendant knew, of course, that he was buying a used car. He was buying it at a much lower price than the price of a new car. It was the duty of the defendant, in bargaining for the car in question, to pay attention to the business in hand and to the car which he was bargaining for, and to see and observe the character, kind, and condition of the car so far as the same was open to be seen and to be known, in case he paid ordinary attention to the car and to the business in which he was engaged. As to anything which he knew, or which by giving ordinary attention to the business in hand he ought to have observed and known, he can not claim that he was deceived, and he can not be permitted to claim that he was induced to make the purchase by any misrepresentation about anything which he knew, or which by ordinary attention he ought to have known the true condition.

In order to constitute a material inducement to the defendant to buy the car, the misrepresentation claimed and proved to have been made must be of some fact of sufficient importance to constitute a real reason to him to make the purchase, and it must be of such a nature that he did not know, and could not by reasonable attention to the business in hand, have learned the truth about it.

The fourth question is this

Did the defendant offer to return the car to the plaintiffs

and demand surrender of his note promptly after he had tested the car out?

The defendant claims and has testified that he tested the car on the day after he purchased it, that he went out into the country and used it, that he came back with it, and that he found it not in the condition in which he claims it was represented to be. He claims that he immediately—that is, within the next few days at the longest, offered the car back to the plaintiffs and demanded back his note. He said he did not take the car to the garage because he could not start it, and that it was standing in his own barn or garage, but that he told the plaintiffs then at that time that he didn't want the car, and that they were to come and get it, and he wanted back his note. Now that is flatly denied by the plaintiffs. They say that no such thing occurred, and that no offer to return the car was ever made until a year later—that is, in April of the year 19—. There is here a difference in the evidence which you will have to resolve. If there was no offer to return the car, and no demand for the return of his note until a year after this purchase was made, then of course, you will answer this question "No." If, on the other hand, there was an offer by the defendant to return the car promptly—that is, within the short time that he testifies he did offer to return it, then, of course, you will answer this question "Yes." Your determination of that question will depend upon whom you believe.<sup>34</sup>

(6) It appears without dispute that on May 27, 19—, the defendant B. went to Oshkosh and then to Appleton, to negotiate with the plaintiff G. Co. for the sale to it of an ABC automobile which B. was then driving, and in the negotiations with plaintiff's representatives, Mr. R. at Oshkosh and Mr. S. at Appleton, a bargain was made by which B. turned over to the G. Co. the ABC automobile and a check for \$800 in exchange for a used XYZ automobile, then owned by the G. Co. It appears that B. then drove the XYZ car home to Rhinelander. Defendant B. claims that he was induced to enter into this purchase by false representations in respect to the condition of the car, made to him by the plaintiff's representatives, that he would not have purchased the car as he did if he had known the true condition of the car. It appears that B. promptly complained of what he claimed to have been misrepresentation, and stopped payment of his \$800 check, and tendered back the XYZ automobile, and demanded back the ABC automobile; that the plaintiff refused to rescind and undo the bargain, and there-

<sup>34</sup> *Dahlke v. Radtke*, Circuit Court, Marathon County, Wisconsin

upon the defendant took home the XYZ automobile, and thereafter repaired and then used it until it was burned in the following winter. The defendant has counterclaimed against the plaintiff to recover his damages which he claims to have suffered because of the alleged misrepresentations.

The questions now to be submitted to you set out the issues for you to decide in this case. You are to answer these questions from the evidence received on this trial, considered in the light of the instructions which I will now give you.

The first question is this:

As an inducement to the defendant to purchase the XYZ automobile in question, did the plaintiff's representatives state to the defendant,

- (a) That the XYZ automobile had been used as a demonstrator?
- (b) That it had been operated not more than 11,000 to 12,000 miles?
- (c) That it was in good condition?

This presents three inquiries, each relating to a statement of fact which the defendant B claims was made to him by plaintiff's representatives to induce him to purchase the XYZ car.

The inquiry is simply whether the alleged statements, or any of them, were or was made to him as he claims, to induce him to make the purchase.

The second question is this:

If you answer "Yes" to any of the inquiries in the first question, then answer the corresponding inquiries here following. Did the defendant B rely upon such statements as true in making his purchase of the XYZ automobile,

- (a) In respect to its use as a demonstrator?
- (b) In respect to the mileage of its travel?
- (c) In respect to the car being in good condition?

Notice that you are not to answer any particular inquiry contained in this question unless you first answer "Yes" to the corresponding inquiry in the first question. For example, if you answer "Yes" to inquiry (a) in the first question, then you are to answer inquiry (a) in the second question, but if you should answer "No" to inquiry (a) in the first question then you are not to answer inquiry (a) in the second question.



The question here is whether the defendant B. believed to be true the statements which you find, if any, were made to him, and relied thereon, in purchasing the XYZ car.

If B. did not rely on such statements, if any, as were made to him, about the condition of the automobile, and was not induced thereby to make the purchase, but on the other hand he relied solely on his own observation and judgment as to the condition of the XYZ car and was not deceived by any statements made by the plaintiff's representatives, then your answer to the inquiries in this question should be "No." But if he did believe the alleged statements to be true and did rely thereon, and became thereby induced to make the purchase, then your answer should be "Yes."

The third question is this

If you answer "Yes" to any of the inquiries in the first question, then answer the corresponding inquiry here following: Were the statements which you find were made, untrue,

- (a) In respect to the automobile having been used as a demonstrator?
- (b) In respect to not being operated over 11,000 to 12,000 miles?
- (c) In respect to the car being in good condition?

Notice again that you are not to answer any particular inquiry in this question unless you should answer "Yes" to the corresponding inquiry in the preceding question.

If you find it your duty to answer any inquiry in this question, the inquiry is simply whether such statement or statements as to the car's condition, which you find were made, was or were untrue

The fourth question is this

If you find that the condition of the XYZ automobile was misrepresented at the time of its purchase, what was the difference between the value of the automobile in the condition in which it was represented to be and its value in the condition in which it actually was, at that time?

Read this question carefully before trying to answer it. You are to answer it only in case you can find that the condition of the XYZ automobile was in fact misrepresented

If it becomes your duty to answer it, then you are first to consider the evidence and determine what the XYZ automobile would have been worth in the market if it had been in

the condition in which it was represented to be at the time of the purchase. You are to consider and determine what the XYZ automobile was worth in the market, in the condition in which it actually was when defendant B purchased it. The difference between these two values will be your answer to this question.

You will bear in mind that B agreed to pay for the XYZ car, \$800 in cash, and the ABC automobile, which was delivered to plaintiff. The value of the ABC automobile, plus the \$800, was the total price to be paid.

Presumably it was worth that much if it was in the condition in which it was represented to be. If it was not in the condition in which it was represented to be, then you are to determine how much it actually was worth in the market, and deduct the latter from the former and the difference will be your answer.<sup>35</sup>

### § 315. Compensation for use.

It appears that in 19— and thereafter the plaintiff owned an automobile, and that the defendant was engaged in the business of delivering daily papers of the Wisconsin Rapids Tribune to post-offices on two or more routes over which he traveled by motor vehicle, and that he also carried on a parcel delivery business. The plaintiff and defendant were intimate friends and together they drove about a great deal in plaintiff's automobile. The circumstances are shown by the evidence.

Plaintiff claims that soon after the defendant began the newspaper delivery business he asked and obtained from her the use of her automobile for his business purposes and thereafter used it a great deal upon an understanding or agreement that he would compensate her therefor.

The first question for you to answer is this:

Did the defendant about June 1st, 19—, obtain from the plaintiff the right to use her automobile for his business purposes on an agreement that he would compensate plaintiff therefor?

If the defendant requested the use of plaintiff's automobile in his business and she consented thereto under a promise by him to compensate her for such use, that would constitute an agreement within the meaning of this question. So, too, if the

<sup>35</sup> Gibson Co v Brown, Circuit Court, Oneida County, Wisconsin, see 216 Wis 651, 256 NW 635

defendant requested and obtained from the plaintiff her consent to the use of her car in his business and the circumstances were such that she had good reason to believe that he intended to compensate her therefor, then an agreement for such compensation would be implied even though it was not expressly promised by the defendant.

If the evidence fails to establish an agreement to compensate the plaintiff in either of these ways, then you can not properly find that there was any agreement. You are to consider all the circumstances shown by the evidence in answering this question. Before you can answer "Yes" to this question, the greater weight of the evidence on the question must satisfy the jury to a reasonable certainty that the alleged agreement was made.

In determining whether such an agreement was made, you may take into consideration any subsequent conversation between these parties, if any was had, and any subsequent conduct on the part of the defendant which tended to confirm or recognize that an agreement to compensate the plaintiff existed.

The second question is this:

If you answer the first question "Yes," then answer this question: Over what distance in miles did the defendant use the plaintiff's automobile under the agreement?

Note you are not to answer this question at all unless you first answer "Yes" to the first question. If you should answer the first question "No," then you need go no further but leave the other questions unanswered and return your verdict into court. In case you answer "Yes" to the first question then you are here to find the number of miles which the defendant used the plaintiff's automobile in his business under the agreement with the plaintiff.

It appears that the defendant and plaintiff together operated plaintiff's automobile a great deal for their mutual pleasure. All such operations should be left out in considering and answering this second question. Note that the question covers only the use of the car by the defendant for his business purposes under an agreement with the plaintiff.

The burden is upon the plaintiff to satisfy the jury by the evidence to a reasonable certainty that the defendant used the automobile in his business for the number of miles which you find by your answer to this question.

The third question is:

If you answer the first question "Yes," then what was

the reasonable value of such use by the defendant of the plaintiff's automobile?

Note again that you are not to answer this question at all unless you answer "Yes" to the first question. If you come to answer this third question you are here to decide what was the reasonable value of the use of the automobile.

It appears that defendant furnished gasoline and oil for the car whenever he used it and did some other things by way of repairs and furnishing tires and possibly other things, but did not pay any taxes or license fees or insurance premiums or cost of shelter, nor pay anything for wear and depreciation of the car. You are to take all these circumstances into consideration and here decide what was the reasonable value of the use that he made of the car in his business over and above the furnishing of things which he furnished while operating the car.

The burden is upon the plaintiff to satisfy the jury by the evidence to a reasonable certainty of the value of the use inquired about which you fix upon as your answer to this question <sup>36</sup>

**§ 316. Damages for unlawful detention. <sup>37</sup>**

(1) In the event you find that plaintiff is entitled to the possession of the property in controversy, you will then fix the value of the same and assess damages for its unlawful detention.

The damages for the unlawful detention of the property is not the value of the property, but it is damages for the detention during the time it was detained, and that would be whatever sum you find from the evidence it really was. It must be, in any event, a nominal amount, 1 cent or \$1.00; but whether it be more or less is for you to determine, from all the evidence, as to what sum should be assessed for the detention for the time it has been withheld <sup>38</sup>

(2) The value of said property would be determined by deducting from its market value, as shown by the evidence to be the sum of \$581.10, the amount due thereon, as shown by the evidence. The damages sustained by the plaintiff in such case would be measured by the value of the use of said truck as shown by the evidence from the time it was taken possession of by the defendant until the present time, the date of the trial of this cause <sup>39</sup>

<sup>36</sup> *Jutrash v Sowaske*, Circuit Court, Wood County, Wisconsin

<sup>37</sup> See also, Chapter 59, Conversion

<sup>38</sup> *Atlas Securities Co v Mar-*

*shall*, Circuit Court, Marion County, Indiana, No 36816

<sup>39</sup> *General Motors Truck Co v Perry*, 99 IndApp 357, 192 NE 720

## CHAPTER 12

### LIABILITY FROM OPERATION OF AUTOMOBILES AND OTHER MOTOR VEHICLES

Section	Section
320 Liability from operation generally	341 —Effect of contributory negligence generally, contributory negligence as proximate cause of injury
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322 —Definitions of unavoidable accident	342A Comparative negligence
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324 —Inference of negligence from proof of collision and resulting injury, res ipsa loquitur	344 Speed and control generally
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327 —Negligence defined, care required, general rules and tests	347 —Bridges
328 —Right to use highway	348 —Congested traffic
329 —Duty to anticipate presence of others on highway on street	349 —Defects and obstructions in streets and highways, ice and snow
330 —Proper lookout, duty to use other faculties to avoid dangers and injuries	350 —Intersections and junctions
331 —Relying on care of another	351 —Highways outside cities
332 —Duty to anticipate dangers and foresee natural and probable consequences of acts or omissions	352 —Residence or sparsely settled portions of city
333 Exclusion of insurance from consideration of jury	353 —Closely built up, thickly settled, or business portions of city
334 Excessive number of occupants in vehicle	354 Condition and equipment of vehicle, proper use of equipment and accessories
335 Proximate cause of injury generally	355 —Brakes
336 —Concurrent causes of injury, joint and several liability	356 —Lights
337 —Intervening efficient cause	357 —Horn and other signaling devices
338 Contributory negligence generally	357A —Mirror
338A —Operator holding part of body outside vehicle	358 —Steering gear or facilities
339 —Reliance on care of person causing injury	359 —Accelerator sticking
340 —Presumptions and burden of proof as to contributory negligence	360 —Radius rods
	361 —Goods loaded and transported, length and width of vehicle and load
	362 —Coupling of trailer to vehicle
	363 Competency of operator generally
	364 Intoxication of operator or previous drinking of intoxicating liquors
	365 Age of operator

Section	Section
366 Sudden illness, dizziness, or disability of operator	398 —Sole negligence of operator
366A Operator falling asleep	399 —Care required of passenger generally
367 Operator stung by insects	400 —Competency of operator generally
368 Identity of operator	401 —Intoxication of operator
369 Identity and ownership of vehicle	402 —Intoxication of passenger
370 Effect of violation of statute generally	403 —Crowding of passengers
371 —Brakes	404 —Riding on outside of vehicle
372 —Lights	405 —Passenger holding leg outside vehicle
373 —Horn, bell, or other signaling device	406 —Passenger in bus
374 —Flags on articles extending from vehicles	407 —Lights on vehicle in which passenger is riding.
375 —Age of operator	408 —Passenger's use of faculties to discover dangers and to warn operator
376 —Right of way at intersections	409 —Passenger asleep
377 —Duty to stop at stop signs	410 —When operator is driving at excessive speed or is driving negligently or recklessly
378 —Passing street cars	411 —Passenger's negligence as proximate cause, injury avoidable by operator of other vehicle, comparative negligence
379 —Following too close to vehicle in front	412 —Contributory and imputed negligence of children passengers
380 —Driving on wrong side of highway	413 Contributory and imputed negligence of absent owner in action for damage to his vehicle
381 —Speed	414 Injuries to pedestrians in general
382 —Reckless or dangerous driving	415 —Crossing street or highway
383 Effect of violation of ordinance generally	416 —Walking along street or highway
384 —Brakes	417 —On sidewalk
385 —Arm signals	418 —Attempting to rescue child from street
386 —Speed.	419 —In garage
387 —Driving on wrong side of street	420 Injuries to intoxicated persons
388 —Duty to stop before crossing or turning into certain streets	421 Injuries to aged or infirm persons
388A —Right of way at intersections	422 Injuries to persons having defective sight
389 —Making "U" turns	423 Injuries to persons having defective hearing, noise affecting hearing
390 —Passing street car	424 Injuries to children in general.
391 Common-law negligence and relation to statutes.	425 —Crossing street or highway
392 Customs and usages	
393 Guest statutes, wilful, wanton, or reckless conduct, gross negligence	
394 —Negligence of plaintiff or operator of other vehicle as a defense	
395 Who is a guest under guest statutes	
396 —Contributory negligence of passenger, in general	
397 —Imputed negligence, joint enterprise.	

Section	Section
426 —Walking along street or highway	taking and passing another automobile
427 —Playing, skating, or coasting in street or highway	462 —Speed and control
428 —On private premises	463 —Horn and other signals of driver
429 —In alley	464 Automobiles stopping, starting, turning, and backing
430 Injuries to persons working in street or highway	465 —Speed
431 —Examining or repairing automobile	466 —Lookout
432 —Pushing automobile	467 —Signals of operator
433 —Linemen	468 —Stop lights on rear of automobile
434 —Traffic officers	469 Automobiles standing, parked, or unattended
435 —Street sweepers	470 —Lights
436 —Using push cart	471 —Place
437 Injuries to persons waiting for, entering, or leaving street and interurban cars	472 —Brakes
438 —Safety zones	473 Automobile pushing or pulling another vehicle
439 Injuries to persons waiting for, entering, or leaving buses	474 Police vehicles
440 —Injuries to persons entering and leaving other vehicles	475 Vehicles used for fighting fire or rescuing property from fire
441 —Collision of automobile with bicycle, in general	476 Ambulances
442 —Speed and control	477 Vehicles used by physicians and surgeons
443 —Horn and other signals from automobile	478 Frightening or injuring animals, injuries to animal riders
444 —Lights	479 Collision of motor vehicle with animal-drawn vehicle
445 —Collision of automobile with motor-cycle, in general	480 Successive collisions and collision of several vehicles
446 —Speed and control	481 Liability of private owner or operator of motor vehicle for injuries to passenger
447 —Lights	482 —Contributory and imputed negligence of injured person
448 —Arm signals	483 Persons liable for negligence of operator
449 —Collision of automobile with public carrier injuring occupant of carrier	484 —City, county, or state
450 Automobiles meeting, in general	485 —Hospital and charitable associations and corporations
451 —Speed and control	486 —School corporations or districts
452 —Lights	487 —Owners generally
453 —Marked traffic lanes	488 —Partners or joint owners
454 —Curves and hills	489 —Owner riding in vehicle
455 —Bridges	490 —Common carriers
456 —While or after overtaking and passing another vehicle	491 —Owner permitting operation of defective vehicle
457 Automobiles crossing — intersections—right of way	492 —Owner permitting incompetent operator to drive
458 —Speed and control	493 —Proof of ownership as re-
459 —Traffic signs and signals in street or highway	
460 —Horn and signals of driver	
461 Automobile following or over-	

Section		Section	
	buttable prima facie case of responsibility for operator's negligence	497	—Parent and child
494	—Master, employer, or principal generally	498	—Husband and wife
495	—Violation of instructions of personal use by agent or servant	499	—Acts of independent contractors
496	—Family and relatives generally	500	—Occupant other than owner or operator, joint enterprise
		501	—Seller
		502	—By lessee of his agent

### § 320. Liability from operation generally.

#### Indiana

An automobile, as such, is neither a dangerous instrument nor an attractive nuisance for children. The rules of law are applied to it in the same manner as to other vehicles. The driver of an automobile is required to use the care, which an ordinarily prudent person would exercise under like circumstances. This is the care required by law as explained to you in these instructions, and it is for you to determine from the evidence before you, whether or not the defendants have measured up to it.<sup>1</sup>

#### Kansas

While an automobile in good mechanical condition is not a dangerous instrumentality, one which is so defective that it can not readily be controlled is highly dangerous, owing to its weight, power, and speed; and the rule of law is thoroughly established that the owner of an instrumentality of dangerous character is bound to take exceptional precautions to prevent its doing mischief to others.<sup>2</sup>

#### New York

An automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous per se than a team of horses and a carriage, or a gun, or a sail boat, or a motor launch.<sup>3</sup>

#### Wisconsin

An operator has no right to proceed unless he can do so with reasonable safety to himself and to all other travelers.<sup>4</sup>

<sup>1</sup> Feldman v Greenwald, Circuit Court, Marion County, Indiana, No 36737

<sup>2</sup> Tannahill v Depositors' Oil & Gas Co, 110 Kan 254, 203 P 909

<sup>3</sup> Teich v Ruppert, 201 AppDiv 682, 194 NYS 645

<sup>4</sup> Milwaukee Automobile Ins. Co v Employers Mut Indem. Co, Circuit Court, Marathon County, Wisconsin.



§ 321. — Liability is based on proof of negligence.

Alabama

(1) The burden of proof is upon plaintiff to show that the proximate cause of plaintiff's injuries and death was the direct result of the negligence of the driver of defendant's automobile; if you are not reasonably satisfied from all the evidence that plaintiff has proved such negligence on the part of defendant's driver of the automobile, your verdict must be for defendant.<sup>5</sup>

(2) If you find, after a consideration of all the evidence, that the plaintiff's injuries were caused by an unavoidable accident, your verdict should be for defendant.<sup>6</sup>

California.

(1) I instruct you that the plaintiffs in this action are not entitled to recover damages unless it is shown by a preponderance of the evidence that the defendants were guilty of negligence, in the manner stated in plaintiffs' complaint, and, if the plaintiffs fail to prove such negligence on the part of defendants, your verdict must be in favor of the defendants.<sup>7</sup>

(2) Plaintiff having alleged that she has been damaged by the careless and negligent act of the defendants as set forth in her complaint, the burden of proving affirmatively by a preponderance of the evidence every fact and circumstance necessary to make out her case is cast upon her; the law presumes nothing against the defendants or either of them; the law casts upon the plaintiff the burden of proving by a preponderance of the evidence that she was injured and damaged through the careless and negligent act of the defendants or either of them, as alleged in her complaint and that such careless and negligent act on the part of the defendants was the proximate cause of such injury and damage as is alleged in the complaint, otherwise you must render a verdict for the defendants.<sup>8</sup>

Colorado

The burden is on the plaintiff to establish his case by a preponderance of the evidence, and, if he has done so, your verdict should be for the plaintiff, otherwise, your verdict should be for the defendant.<sup>9</sup>

Connecticut

Where several acts of negligence are alleged by the plaintiff,

<sup>5</sup> *Karpeles v City Ice Delivery Co*, 198 Ala 449, 73 S 642 See also *Brown v Woolverton*, 219 Ala 112, 121 S 404, 64 ALR 640

<sup>6</sup> *Alabama Produce Co v Smith*, 224 Ala 688, 141 S 674

<sup>7</sup> *Idemoto v Scheidecker*, 193 Cal 653, 226 P 922

<sup>8</sup> *Traylen v Citraro*, 112 CalApp 172, 297 P 649

<sup>9</sup> *Seeing Denver Co v Morgan*, 66 Colo 565, 185 P 339

as in this case, it is not necessary that all of those acts of negligence be proved in order to entitle the plaintiff to recover. It is sufficient if any one or more of them be proved.<sup>10</sup>

#### Florida

If you find from the evidence in these two cases that the injury complained of was the result of an unavoidable accident, you must find for the defendant.<sup>11</sup>

#### Georgia.

If you shall find that neither the plaintiff nor the defendant was at fault, or negligent, the plaintiff's injuries, if any, will be attributed to accident; and if you shall find the plaintiff's injuries, if any, were the result of a pure accident not occasioned by any failure on the part of either of the parties to exercise ordinary care and diligence, the plaintiff can not recover.<sup>12</sup>

#### Idaho

The court charges you that the plaintiff is not entitled to recover merely because the accident occurred, or merely because he has commenced an action against the defendants, and no negligence on the part of the defendants may be inferred from the mere circumstances of the accident having occurred or the suit having been brought.<sup>13</sup>

#### Indiana

(1) The mere fact, if it be a fact, that the plaintiff's automobile was damaged at the time and place in question, is not sufficient to establish a liability on the part of the defendant herein, but plaintiff must go further, and show by a preponderance of the evidence that the injury was caused by the acts of negligence of the defendant, as alleged in his complaint.<sup>14</sup>

(2) The court instructs you that in the case under consideration to warrant a recovery by the plaintiff, it is not enough for her to show that a collision happened and that injury resulted to her therefrom. Nor is negligence to be presumed or inferred by you from the mere fact of the occurrence involved in the present case. She must go further and show by a preponderance of the evidence that the collision which caused her injury was due solely to some one or more of the

<sup>10</sup> Doerr v Woodland Transp Co, 105 Conn 689, 136 A 693. See also Dunbar v Jones, 87 Conn 253, 87 A 787, Rolston v Pratt, 101 Conn 490, 126 A 841.

<sup>11</sup> Florida Motor Lines, Inc v Casad, 98 Fla 720, 124 S 180.

<sup>12</sup> Cochran v Kendrick, 43 GaApp

135, 158 SE 57. See also Hollomon v Hopson, 45 GaApp 762, 166 SE 45.

<sup>13</sup> Rudolph v Wannamaker, 41 Idaho 98, 238 P 296.

<sup>14</sup> Davis v Borcharding, Circuit Court, Marion County, Indiana, No 40944, Instructions, 1926-28, p 388.

negligent acts charged in the complaint and if she has failed therein, she can not recover and your verdict should be for the defendant <sup>15</sup>

(3) If you believe from the evidence that this collision was a pure accident, not caused by the negligence of either party, then your verdict should be for the defendant <sup>16</sup>

#### Iowa

The burden of proof in this case is placed upon the plaintiff, to prove and establish his claim and cause of action by the preponderance of the evidence. If he has so established his claim and cause of action, then your verdict should be for the plaintiff; but, on the other hand, if he has not so established his claim or cause of action, then your verdict should be for the defendants. <sup>17</sup>

#### Kansas

You are further instructed that, if you should find from the evidence that the occurrence in question was a pure accident, for which no one was responsible, you will not allow damages, but will merely return a verdict for the defendants. <sup>18</sup>

#### Maryland

(1) The court instructs the jury that, unless they shall be satisfied by a preponderance of the evidence that the accident complained of was caused solely by some act of negligence of the defendant, the plaintiff is not entitled to recover, and the verdict must be for the defendant. <sup>19</sup>

(2) The court instructs the jury that the mere happening of the accident complained of raises no presumption of negligence on the part of the defendant operating the automobile complained of in the evidence, but the burden is upon the plaintiff to establish by a fair preponderance of affirmative evidence that negligence on the part of said defendant caused said accident, and, if the minds of the jury are left in a state of even balance as to the existence of such negligence, then the verdict of the jury must be for the defendant <sup>20</sup>

<sup>15</sup> Bookatman v C R Akers Co, Circuit Court, Marion County, Indiana, No 43782, Instructions, 1928-30, p 372

<sup>16</sup> Best v Great Atlantic & Pacific Tea Co, Circuit Court, Marion County, Indiana, No 38322, Instructions, 1924-26, p 271

<sup>17</sup> Young v Jacobsen Bros, 219 Ia 483, 258 NW 104

<sup>18</sup> Engle v Bowen, 122 Kan 283, 251 P 1108

<sup>19</sup> Clark Bros & Co, Inc v United Rys & Elec Co of Baltimore City, 137 Md 159, 111 A 829 See also Beall v Ward, 158 Md 646, 149 A 543

<sup>20</sup> Ottenheimer v Molohan, 146 Md 175, 126 A 97

**Michigan.**

I charge you further, as a matter of law, that to enable the plaintiff to recover, he has the burden of proof of establishing by a fair preponderance of the evidence, first, that the defendant was guilty of negligence and, second, that he was himself free from any negligence which contributed to the accident.<sup>21</sup>

**Minnesota**

If you decide that this was an unavoidable accident, then, of course, you cannot find the defendant driver was negligent and that such negligence was a proximate cause of the injury to plaintiff's decedent.<sup>22</sup>

**Missouri**

(1) The charge laid by plaintiff against the defendants is one of negligence. Negligence is a positive wrong, and therefore in this case is not presumed. In other words, a recovery may be had on a charge of negligence only when such charge is sustained by the preponderance, that is, the greater weight of the credible evidence, to the reasonable satisfaction of the jury, that the charge is true as laid, and it does not devolve upon the defendants to disprove the charge, but rather, the law casts the burden of proof in this respect upon the plaintiff, and such charge of negligence must be sustained by the preponderance, that is, the greater weight of the credible evidence, to the satisfaction of the jury, as above stated. If, therefore, you find the evidence touching the charge of negligence against defendant to be evenly balanced, after fairly considering the evidence, your verdict must be for the defendants.<sup>23</sup>

(2) The court instructs the jury, that in deliberating upon this case, it is your duty to decide first whether or not, under all of the facts and circumstances in evidence, there is or is not any negligence upon the part of defendant, as submitted and defined by other instructions. Until this question of negligence has been determined by you, you have no right to consider the amount, if any, that plaintiff is entitled to recover.

If the plaintiff is not entitled to recover, that is, if plaintiff has not shown to your reasonable satisfaction by the preponderance or greater weight of the credible evidence upon the question of negligence that she should recover at your hands, then in

<sup>21</sup> Flannigan v Harder, 268 Mich 564, 256 NW 549. See also Grogitzki v Detroit Ambulance Co, 186 Mich 374, 152 NW 923, Anderson v Lynch, 232 Mich 276, 205 NW 134, Rowland v Brown, 237 Mich 570,

213 NW 90.

<sup>22</sup> Daly v Springer, 244 Minn 108, 69 NW2d 98.

<sup>23</sup> Jones v Missouri Freight Transit Corp, 225 MoApp 1076, 40 SW2d 465.

your deliberations you should not and must not consider to what extent, if any, plaintiff has been damaged by reason of the collision mentioned in evidence.<sup>24</sup>

#### Montana

Before you can find your verdict in favor of the plaintiff and against the defendant J. K., you must find from a preponderance of all the evidence in this case that the said defendant J. K., was guilty of some act of negligence charged in plaintiff's complaint, and, as a result thereof, the plaintiff was injured; and unless you find from a preponderance of the evidence that he was guilty of negligence as defined in these instructions, and as charged in the complaint, then your verdict must be in favor of the defendant J. K., and against the plaintiff.<sup>25</sup>

#### New Hampshire

I instruct you under the law that skidding, in and of itself, is no evidence of negligence. If you find on the evidence that this accident was caused merely because the car skidded or that it was a pure accident, then your verdict must be for the defendant.<sup>26</sup>

#### New York

So, under the circumstances in an ordinary case of negligence, the burden of proof would be upon the plaintiff to prove to your satisfaction that the defendant was careless, and that he, the plaintiff, was not careless. I say "to your satisfaction." I mean by that that the preponderance of proof, the weight of evidence, must be stronger in favor of the plaintiff under his complaint, or, under the counterclaim, the weight of evidence must be stronger with the defendant.<sup>27</sup>

#### North Dakota.

If there was no negligence on the part of the defendant, no lack of ordinary care under all of the circumstances, then it would not matter what happened to the plaintiff, he can not recover. He can not recover for just a mere accident. He can not recover simply because he got hurt unless P. was guilty of negligence, guilty of failure to use ordinary care under all the circumstances there at that time and place and in doing what he was doing.<sup>28</sup>

<sup>24</sup> Hogan v American Transport, Inc (Mo), 277 SW2d 495

<sup>25</sup> Mellon v Kelly, 99 Mont 10, 41 P2d 49

<sup>26</sup> Burns v Cote, 86 NH 167, 164 A 771

<sup>27</sup> Spinneweber v Every, 189 App Div 35, 177 NYS 801

<sup>28</sup> Motley v Standard Oil Co., 61 ND 660, 240 NW 206

**Ohio**

I say to you before we proceed further, that the fact that the plaintiff, H R, may have received some injuries, even a serious injury, from the collision of the automobile in which he was riding with the D automobile, does not in and of itself make the defendant liable to him for such injury. It is only in the event that you find from all the evidence, in the method I shall explain to you, that the defendant was guilty of negligence on his part in the manner in which he operated his automobile and that the injuries to the plaintiff resulted from such negligence, or from his negligence together with the negligence of the said D., in the manner in which he operated his automobile and that plaintiff himself was not negligent in such manner as contributed to his injuries, that plaintiff can be entitled to recover from defendant.<sup>29</sup>

**Oklahoma**

You are instructed that if you find from all of the facts and circumstances introduced in the evidence during the trial of this case that the injuries sustained by the plaintiff were the result of an unavoidable accident or inevitable accident and that such accident happened without fault, then your verdict should be for the defendant.<sup>30</sup>

**Oregon**

I instruct you that if you find from the evidence that the accident in this case was a pure accident and was not proximately caused by any negligence on the part of either Mr B. or Mr. S, then there would be no liability on the part of the defendant to plaintiff, and your verdict should be for the defendant.<sup>31</sup>

**Vermont**

There is a presumption that the defendant obeyed the law of the road, both with respect to the operation of his car as regards speed and signaling with horn, if he was required to do so, and in other respects in the management of the car.<sup>32</sup>

**Virginia**

The court instructs the jury that the basis of this action is negligence and you can not infer negligence on the part of the defendant from the mere happening of an accident. The law imposes on the plaintiff the duty of proving her case by the

<sup>29</sup> Rohlif v Chapman, Common Pleas Court, Huron County, Ohio

<sup>30</sup> Wilson v Roach, 101 Okl 30, 222 P 1000

<sup>31</sup> Bly v Moores Motor Co, 145

Or 528, 28 P2d 627

<sup>32</sup> Clark v Demars, 102 Vt 147, 146 A 812 See also Larrow v Maitell, 92 Vt 435, 104 A 826

preponderance of all the evidence, and this burden rests upon her throughout the entire trial and applies at every stage thereof, and you can not, under your oaths, find a verdict in favor of the plaintiff unless and until she has proved by the preponderance of all the evidence that the defendant was guilty of the negligence charged against him, and that such negligence was the proximate cause of the injury complained of.

If, after hearing all of the evidence, you are uncertain as to whether the defendant was guilty of negligence, and it appears equally as probable that he was not negligent as that he was, then your verdict must be for the defendant.<sup>33</sup>

#### Washington.

(1) You are instructed that negligence is never presumed, but must be established by a preponderance of the evidence, the same as any other fact in the case; and unless you find from a preponderance of the evidence in this case that the charge in plaintiff's complaint that defendant was driving his automobile on his left-hand half of the highway is true, your verdict must be for the defendant.<sup>34</sup>

(2) You are instructed that if, after full consideration of all the evidence, you believe that the collision complained of was due to accident, which under all the circumstances was unavoidable, then there can be no recovery in this action and your verdict must be for the defendants.<sup>35</sup>

#### Wisconsin

The fact that the collision occurred and serious results followed does not of itself show that it was produced by negligence. Such a result may be the result solely of accident. If this collision occurred without it being produced in whole or in part by negligence on the part of R, then it was an unavoidable accident.<sup>36</sup>

### § 322. —Definitions of unavoidable accident.

#### Arkansas

The burden rests upon the one who seeks to recover to establish by a preponderance of the evidence that the accident complained of by him was not the result of an unavoidable accident.

<sup>33</sup> *Lucas v Craft*, 161 Va 228, 170 SE 836. See also *Trauerman v Oliver's Admr*, 125 Va 458, 99 SE 647.

<sup>34</sup> *Van Cello v. Clark*, 157 Wash 321, 289 P 19.

<sup>35</sup> *O'Connell v Home Oil Co*, 180 Wash 461, 40 P2d 991.

<sup>36</sup> *Levandowski v Rostalsky*, Circuit Court, Marathon County, Wisconsin.

An unavoidable accident is one not avoidable by precaution which a reasonable man under the same or similar circumstances as those in this case would be expected to take. Such an accident furnishes no basis for recovery.<sup>37</sup>

#### California

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

Bear in mind, however, that if the defendant failed to exercise ordinary care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained.<sup>38</sup>

#### Florida

You are charged here that an unavoidable accident is a casualty which occurs without negligence of either party and when all means which common prudence suggests have been used to prevent it. Therefore, if you find from the evidence that the plaintiff received the alleged injuries, if any, by reason of an unavoidable accident brought about as the direct, proximate result of unavoidable circumstances as here defined by the court, you will find for the defendant.<sup>39</sup>

#### Indiana.

If you find from the evidence that the accident, and resulting injury complained of, was one which, by the exercise of reasonable care, the defendant could not have reasonably been expected to foresee and prevent, then it belongs to that class of occurrences which in law is denominated as purely accidental and for which no liability exists.<sup>40</sup>

#### Maryland

An unavoidable accident is one which could not have been obviated by the exercise of legally requisite care by any of the

<sup>37</sup> Elmore v Dillard, 227 Ark 260, 298 SW2d 338

<sup>38</sup> Merry v Knudsen Creamery Co, 94 CalApp2d 715, 211 P2d 905. The instruction given here was approved, but judgment for defendant was reversed for error in the charge in other respects. McMahon v. Kern

County Union High School & College Dist, 150 CalApp2d 218, 309 P2d 465

<sup>39</sup> Baston v Shelton, 152 Fla 879, 13 S2d 453.

<sup>40</sup> United States Nat Bank v Davis, Superior Court, Lake County, Indiana, No. 2573.



persons whose responsibility for the occurrence is asserted or denied. If either the plaintiff or defendant could have averted the accident by proper care, it could not be said to have been unavoidable.<sup>41</sup>

#### Oklahoma

An "unavoidable accident" is a casualty which occurs without negligence of either party, and when all means which common prudence suggests have been used to prevent it.<sup>42</sup>

#### South Carolina

An accident is one of those unfortunate things that happen where people in the exercise of their ordinary senses just can not prevent it. Now the law does not punish any one for an accident, it only punishes them for a conscious wrongdoing that one should not do in a given circumstance. Keep that in mind.<sup>43</sup>

#### Texas

An unavoidable accident exists where the injuries or damages are not proximately caused by any negligence of commission or omission on the part of either party.<sup>44</sup>

#### Vermont.

To be an unavoidable accident as to the defendant, it must have occurred without any proximate negligence on his part. Exclusive of contributory negligence of the plaintiff, the test of liability is not whether the injury was accidental, but whether the defendant was at fault.<sup>45</sup>

#### Wisconsin

An unavoidable accident is defined to be an event happening unexpectedly from the uncontrollable operations of nature, without human agency. It is further defined and means an event that takes place without any one's foresight or expectation; an

<sup>41</sup> Dwyer v Chew, 149 Md 281, 131 A 350

<sup>42</sup> Haskell v Kennedy, 151 Okl 12, 1 P2d 729. See also Wilson v Roach, 101 Okl 30, 222 P 1000

<sup>43</sup> Daugherty v Williams, 144 SC 437, 142 SE 722

In considering this instruction the court said "The language used by the trial judge to the effect that the law does not punish one for an accident, but it only punishes one for a conscious wrong-doing, taken in connection with other portions of the charge, was not confusing to the jury, in our opinion. In other parts

of the charge, the jury was clearly instructed that, if the negligence of defendant's agent, his daughter, who was in charge of the car, caused the injuries to the plaintiff, and there was no contributory negligence on the part of the plaintiff which proximately caused the injuries, the defendant would be liable."

<sup>44</sup> Stedman Fruit Co v Smith (TexCivApp), 28 SW2d 622. See also Woodward v Murphy (TexCivApp), 29 SW2d 828

<sup>45</sup> Larrow v. Martell, 92 Vt 435, 104 A 826.

event from an unknown cause or an unusual or unexpected event from a known cause; a chance, or casualty; anything occurring unexpectedly or without known or assignable cause, or an event occurring without negligence. Whether an accident occurred does not depend on the exercise of reasonable care, nor is it prevented by exercise of reasonable care. <sup>46</sup>

**§ 323. — Motor vehicle operator is not insurer.**

**Pennsylvania.**

The driver or chauffeur can not be expected to guard against every possible contingency. He is not an insurer against all accidents. <sup>47</sup>

**Washington**

An automobile driver is not an insurer of the safety of pedestrians on the street; not the guardian of an adult person in full possession of his faculties. <sup>48</sup>

**Wisconsin**

Drivers of automobiles are not, however, insurers of the safety of others, and in case they exercise that degree of care for the safety of others which is prescribed by the statute and such as ordinarily prudent persons usually use under the same or similar circumstances, then they have discharged their duty and are not lacking in ordinary care. <sup>49</sup>

**§ 324. — Inference of negligence from proof of collision and resulting injury; res ipsa loquitur.**

**California**

(1) The mere happening of the accident upon which this action is based, raised no presumption or inference that this defendant was in any way negligent nor does the bringing of this action raise any such presumption or inference <sup>50</sup>

(2) When an instrument which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care. Negligence, of course,

<sup>46</sup> *Linden v. Miller*, 172 Wis 20, 177 NW 909, 12 ALR 665

<sup>47</sup> *Silberstein v. Showell, Fryer & Co.*, 267 Pa 298, 109 A 701.

<sup>48</sup> *Reitan v. Crooks*, 153 Wash 75, 279 P 97.

<sup>49</sup> *Thiel v. Kuelling*, Circuit Court, Marathon County, Wisconsin

<sup>50</sup> *Harlan v. Taylor*, 139 CalApp 30, 33 P2d 422

is not under the above rule to be presumed from the mere happening of the accident, and the inference of negligence arising from the circumstances which bring the case within the doctrine does not change the burden of proof, which remains upon the plaintiff <sup>51</sup>

(3) The presumption arising under the doctrine of *res ipsa loquitur* is evidence in the case, but it has no greater or different effect than the testimony of witnesses, and in no degree changes the rule as to the burden of proof, viz, the burden of producing a preponderance of evidence <sup>52</sup>

#### Idaho.

(1) No negligence on the part of the defendants may be inferred from the mere circumstances of the accident having occurred or the suit having been brought. <sup>53</sup>

(2) You are instructed that when an instrument which causes injury is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use ordinary care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from the want of ordinary care. <sup>54</sup>

#### Indiana

The mere fact that an accident occurred at the time and place mentioned in the plaintiff's complaint and that as a result of said accident, the plaintiff sustained injuries, would not in itself be sufficient to justify you in returning a verdict against the defendant, but the plaintiff must go further and prove by a fair preponderance of all the evidence in the case, that said accident and resulting injury to the plaintiff was the direct and proximate result of one or more of the negligent acts charged in the complaint as having been committed by the defendant. <sup>55</sup>

#### Maryland

The court instructs the jury that the mere happening of the accident complained of raises no presumption of negligence

<sup>51</sup> *Queirolo v Pacific Gas & Elec Co*, 114 CalApp 610, 300 P 487, superseding 295 P 882

See also *Porter v Rasmussen*, 127 CalApp 405, 15 P2d 888, *Godfrey v Brown*, 220 Cal 57, 29 P2d 165, 93 ALR 1092, affg (CalApp), 21 P2d 994

<sup>52</sup> *Godfrey v Brown* (CalApp), 21

P2d 994, affd in 220 Cal 57, 29 P2d 165, 93 ALR 1092

<sup>53</sup> *Rudolph v Wannamaker*, 41 Idaho 98, 238 P 296

<sup>54</sup> *Curtis v Ficken*, 52 Idaho 426, 16 P2d 977

<sup>55</sup> *Caffery v Summers*, Circuit Court, Marion County, Indiana, No 40854

on the part of the chauffeur of the defendants operating the automobile referred to in the evidence, but the burden is upon the plaintiff to establish by a fair preponderance of affirmative evidence that negligence on the part of said chauffeur caused said accident, and if the minds of the jury were left by the evidence in a state of even balance as to the existence of such negligence, then the verdict of the jury must be for the defendants <sup>56</sup>

#### Massachusetts

The fact that the truck belonging to the defendant's company struck the plaintiff's team is not sufficient evidence to justify a verdict for the plaintiff, without further evidence that the accident was caused by a negligent act on the part of the defendant, its agent or servant. The plaintiff must show, by some positive evidence, that a negligent act on the part of the defendant's agent or servant contributed to the cause of the accident, and this may not be inferred without some positive evidence <sup>57</sup>

#### Michigan

It does not follow that because there was an accident and some injury, there can be a recovery by the plaintiff in this case. It must have been an injury caused by some actionable negligence of the defendant's servant, from which plaintiff was free, and while he himself was guilty of no negligence. <sup>58</sup>

#### New Jersey

The mere proof of the occurrence of the accident raises no presumption of negligence on the part of the driver of the automobile. <sup>59</sup>

#### New York

A collision between a pedestrian and a motor car raises no presumption that the operator of the car was negligent. <sup>60</sup>

#### Ohio

The court says to you, as a matter of law, that the law presumes that the driver of defendant's car was not in any manner negligent and, before it can be found by you that he was negligent in any manner, it must be proved against him by the greater weight of the evidence, and the court says to

<sup>56</sup> *Epstein v. Ruppert*, 129 Md 432, 99 A 685. See also *Sullivan v. Smith*, 123 Md 546, 91 A 456, *Beall v. Ward*, 158 Md 646, 149 A 543.

<sup>57</sup> *Washburn v. R. F. Owens Co.*, 252 Mass 47, 147 NE 564.

<sup>58</sup> *Grogitzki v. Detroit Ambulance Co.*, 186 Mich 374, 152 NW 923.

<sup>59</sup> *Horowitz v. Gottwalt* (NJSup), 102 A 930.

<sup>60</sup> *Mallius v. Motor Delivery Co.*, 146 AppDiv 608, 131 NYS 357.

you that you have no right to assume or presume that he was negligent, simply because the accident happened.<sup>61</sup>

#### Virginia

The court instructs the jury that negligence on the part of the defendant can not be assumed merely because in a collision with the defendant's automobile, the plaintiff was injured; but the burden rests upon the plaintiff to establish negligence on the part of the defendant by a preponderance of evidence; and, if the plaintiff fails to do this, the jury must find for the defendant.<sup>62</sup>

#### Washington

The fact that an accident occurred is not of itself any proof of negligence.<sup>63</sup>

#### Wisconsin

(1) The fact that the collision occurred is not conclusive that it was caused by negligence of any person.<sup>64</sup>

(2) Where the instrument causing the injury is shown to be under the management of defendant and the injury is such as in the ordinary course of events does not happen if those who have the management use proper care, the mere happening of the injury affords evidence of negligence.<sup>65</sup>

### § 325. — Prima facie case generally.

#### Alabama.

The court charges the jury that if, under the evidence, they are reasonably satisfied that the defendant was guilty of negligence as charged in the complaint, and as a proximate consequence of such negligence, plaintiff was injured, then it is your duty to return a verdict in favor of the plaintiff.<sup>66</sup>

#### California

If you find from a preponderance of the evidence that the defendant was guilty of negligence which proximately caused the injuries to the plaintiff, you must find for him, provided you also find that he was free from negligence.<sup>67</sup>

<sup>61</sup> Scharff v Levine, 29 OhApp 340, 163 NE 581

<sup>62</sup> McGowan v Tayman, 144 Va 358, 132 SE 316 See also Trauerman v Oliver's Admr, 125 Va 458, 99 SE 647

<sup>63</sup> Reitan v Crooks, 153 Wash 75, 279 P 97

<sup>64</sup> Lapsenberg v Snapp, Circuit Court, Lincoln County, Wisconsin,

see 205 Wis 681, 238 NW 289

<sup>65</sup> Cummings v National Furnace Co, 60 Wis 603, 18 NW 742, 20 NW 665 See also Zarnik v C Reiss Coal Co, 133 Wis 290, 113 NW 752

<sup>66</sup> Thomas v Carter, 218 Ala 55, 117 S 634

<sup>67</sup> Galwey v Pacific Auto Stages, Inc, 96 CalApp 169, 273 P 866 See also Burk v Extrafine Bread Bak-

**Connecticut.**

The essential and material elements of the cause of action alleged, which the plaintiff must prove, are as follows first, that the plaintiff's intestate was killed by a collision with the car of the defendant upon the highway; second, that the car was then being driven by a servant of the defendant acting in pursuance of his employment; third, that the collision and death were caused by the negligent driving of the servant in one or more of the ways alleged; and fourth, that the plaintiff's intestate was free from any negligence on his part which contributed to cause his injuries.<sup>68</sup>

**Delaware**

Now, gentlemen of the jury, if you believe from a preponderance of the evidence in this case that the defendant, at the time of the accident, was the owner of the automobile that caused the injury to the plaintiff, and that the machine or the person operating it was under the direction and control of the defendant, and shall also believe that the injuries to the plaintiff were caused by the negligent running and operation of the machine, and the plaintiff himself was free from any negligence that contributed to the accident, your verdict should be in favor of the plaintiff.<sup>69</sup>

**Indiana.**

(1) In order for the plaintiff to recover, it is not necessary that he prove all the acts of negligence stated in his complaint, but he must prove by a fair preponderance of the evidence at least one of such acts of negligence, and it must further appear that such act of negligence so proved was the proximate cause of the accident, resulting in the alleged injury and damages to plaintiff's property, and plaintiff must further prove that he was free from negligence on his part which contributed to the accident and resulted in injury.<sup>70</sup>

(2) This being an action to recover damages to personal property alleged to be caused by the negligence of the defendant, to entitle the plaintiff to recover, he must show by a fair preponderance of the evidence the following things: first, that his automobile was damaged as charged in his complaint; sec-

ery, 208 Cal 105, 280 P 522, Bibby v Pacific Elec R Co, 58 CalApp 658, 209 P 387, Elsey v Domecq, 114 CalApp 42, 299 P 794, Sale v Illinois Elec Co, 114 CalApp 71, 299 P 561, Rasic v Schultheiss, 121 CalApp 560, 9 P2d 550, Evans v Mitchell, 2 CalApp2d 702, 38 P2d 437

<sup>68</sup> Black v Hunt, 96 Conn 663, 115 A 429

<sup>69</sup> Grier v Samuel, 4 Boyce (27 Del) 106, 86 A 209

<sup>70</sup> Luchene v Zukowski, Superior Court, Lake County, Indiana, No 19034 See also Gerow v Hawkins, 99 IndApp 352, 192 NE 713

ond, that the defendant was guilty of the negligence charged against him in the complaint, third, that such negligence was the proximate cause of the injury to the plaintiff's property so complained of, and fourth, that the plaintiff himself was not chargeable with negligence on his part which proximately contributed to the injuries to his automobile for which he seeks to recover

If the plaintiff has proved all these facts, then he will be entitled to recover.<sup>71</sup>

#### Montana

If you believe from a preponderance of the evidence that plaintiff was injured by the truck and that such injury was directly and proximately caused by any of the negligent acts or omissions of the defendants, the verdict should be for the plaintiff, unless plaintiff was guilty of contributory negligence.<sup>72</sup>

#### Nebraska

The burden of proof is upon the plaintiff to prove all the material allegations contained in her petition, except as such allegations are admitted in the pleadings or upon the trial. The occurrence of the accident is admitted. Therefore, in order to prevail in this case, plaintiff must prove, by a preponderance of the evidence, the following material matters: first, that the proximate cause of the accident and the injuries resulting therefrom, if any, was the negligence of the defendant in one or more of the particulars alleged in plaintiff's petition, second, that the accident would not have occurred but for the negligence of the defendant in one or more of the particulars charged in plaintiff's petition, and third, the amount of plaintiff's damages, if any.<sup>73</sup>

#### North Dakota

If you find from a fair preponderance of the evidence in this case that the car in which plaintiff was riding collided with the truck owned by the M. T. Co., and operated by defendant, S. M., by reason of the carelessness or negligence of the defendant, and that such negligence was the proximate cause of said collision, and there was no contributory negligence on the part of the plaintiff, then the defendants are liable, and your verdict should be for the plaintiff.<sup>74</sup>

<sup>71</sup> *Koplovitz v. Jensen*, Superior Court, Lake County, Indiana, No. 19928, see 197 Ind. 475, 151 NE 390.

<sup>72</sup> *Pierce v. Safeway Stores, Inc.*, 93 Mont. 560, 20 P2d 253.

<sup>73</sup> *Clausen v. Johnson*, 124 Neb. 280, 246 NW 458.

<sup>74</sup> *Billingsley v. McCormick Transfer Co.*, 61 ND 184, 237 NW 714.

**Oklahoma**

If you find by a preponderance of the evidence that plaintiff has been damaged and injured as defined herein, and that such damage and injury were the proximate result of the negligence of the defendant, and that the plaintiff was not guilty of contributory negligence, then you should find in favor of the plaintiff and against the defendant. <sup>75</sup>

**Washington**

The issues on the question of liability are simple, clear, and distinct. They are: first, was the driver of the truck negligent, and, if so, did that negligence proximately cause the accident? Second, was the deceased guilty of contributory negligence which contributed to the accident? And, third, if the driver of the truck was negligent, and the deceased was not guilty of contributory negligence, was the death proximately produced by the accident? <sup>76</sup>

**§ 326. Negligence. <sup>77</sup>****§ 327. — Negligence defined; care required; general rules and tests.****Alabama**

If you are reasonably satisfied from all the evidence in this case that at the time of the accident the defendant was driving his automobile in a careful and prudent manner, and in the manner in which a reasonably prudent man would have driven his automobile under the same or similar circumstances, then your verdict should be for the defendant. <sup>78</sup>

**Arkansas**

Care must be exercised commensurate with the danger reasonably to be anticipated. What is "ordinary care" is a relative term dependent upon the facts and circumstances of each particular case. <sup>79</sup>

**California**

(1) In determining whether or not defendant P. M. used due care and prudence and circumspection, and drove her car at a reasonable and prudent speed, it is the duty of the jury to take into consideration all the circumstances, then and there

<sup>75</sup> Skaggs v Gypsy Oil Co, 169 Okl 209, 36 P2d 865

<sup>76</sup> Lee v H E Gleason Co, 146 Wash 66, 262 P 133

<sup>77</sup> See also Chapter 135, Negligence.

<sup>78</sup> Tyley v Drennen, 255 Ala 377, 51 S2d 516

<sup>79</sup> Murphy v Clayton, 179 Ark 225, 15 SW2d 391. See also Hughey v. Lennox, 142 Ark 593, 219 SW 323.



existing, which would have influenced the conduct of an ordinarily prudent driver in the same situation.<sup>80</sup>

(2) Negligence is not absolute or to be measured in all cases in accordance with the same precise standard, but always relates to some circumstance of time, place, and person.<sup>81</sup>

(3) Negligence is always relative to some circumstance of time, place, or person, and what would be due care under one set of circumstances would be negligence in changed circumstances.<sup>82</sup>

(4) The standard of care required of drivers of motor vehicles, regardless of statutory enactment, is prudence and circumspection at all times.<sup>83</sup>

(5) It is the duty of a party to exercise reasonable care to avoid injury to another.<sup>84</sup>

(6) The amount of care varies with the circumstances surrounding a party. While the test which determines negligence or lack of it is the conduct of an ordinarily prudent person under the same or similar circumstances, necessarily the amount of such care varies with the differences in such circumstances.<sup>85</sup>

(7) Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact.<sup>86</sup>

#### Connecticut

(1) Negligence in law is a breach of duty. It is the failure to exercise that degree of care in given circumstances which a person of ordinary prudence would exercise in similar circumstances. It is the neglect to perform, or the improper or insufficient performance of, a legal duty.<sup>87</sup>

(2) In judging the conduct of the defendant, the jury should try to place themselves, as far as possible, in his situation as the evidence showed it existed, and ask: "What would an

<sup>80</sup> *Perry v McLaughlin*, 212 Cal 1, 297 P 554

<sup>81</sup> *Von Stetten v Yellow-Checker Cab Co*, Consolidated, 100 CalApp 775, 281 P 95

<sup>82</sup> *Maus v Scavenger Protective Assn*, 2 CalApp2d 624, 39 P2d 209

<sup>83</sup> *Godfrey v Brown* (CalApp), 21 P2d 994, *affd* in 220 Cal 57, 29 P2d 165, 93 ALR 1092

<sup>84</sup> *Gutter v Niesley*, 1 CalApp2d 69, 36 P2d 155

<sup>85</sup> *Warnke v Griffith Co*, 133 Cal App 481, 24 P2d 583

<sup>86</sup> *Walters v Du Four*, 132 Cal App 72, 22 P2d 259, 23 P2d 1020

<sup>87</sup> *Dunbar v Jones*, 87 Conn 253, 87 A 787

See also *Brown v New Haven Taxicab Co*, 93 Conn 251, 105 A 706

ordinarily prudent man, and I assume that you are all such, do under the circumstances if you were sitting behind the wheel of the car at the time and place where this accident occurred?"<sup>88</sup>

(3) In determining whether the requisite degree of care has been exercised in any given situation by the plaintiff or the defendant, the conduct of each must be judged in the light of all the surrounding circumstances, and of such knowledge as each has of the situation or would have had by the exercise of due care in the use of the senses. The test is the same for the plaintiff and the defendant. Every person is required to use his senses and is charged with seeing and knowing the things that he or she ought to see or know in the exercise of their faculties as a reasonably prudent person. She was bound to make use of her senses so as to avoid a danger that threatened or that she might reasonably anticipate under all the circumstances.<sup>89</sup>

#### Florida

Actionable negligence is any injury to another by reason of the failure of a person to use such ordinary care and prudence to avoid injury to such other person, when it is reasonably certain that the failure to use such ordinary care and prudence will likely or probably cause injury to another in the ordinary course of events

By ordinary care, the law means such degree of care under the circumstances, as in the situation in which the parties were placed, so far as it may be shown by the evidence, as an ordinarily prudent person would exercise under the circumstances and in the same situation, for one of his age, capacity and experience.<sup>90</sup>

#### Georgia

In considering whether the operator of an automobile exercised due diligence, or, by failure to exercise due diligence, was guilty of negligence, the character of the instrumentality which he operated, and the danger attached to its operation if improperly used, as well as the character of the highway being traversed, and the probability of inflicting injury if all needed care was not used in the operation of the machine, are all to be taken in account.<sup>91</sup>

<sup>88</sup> Ghent v Stevens, 114 Conn 415, 159 A 94

<sup>89</sup> Murphy v Adams, 99 Conn 632, 122 A 398

<sup>90</sup> Baston v Shelton, 152 Fla 879, 13 S2d 453

<sup>91</sup> Huckabee v Grace, 48 GaApp 621, 173 SE 744

**Idaho**

Negligence, as used in the law, is the want of due care, that is, such care as an ordinary prudent person would exercise under like circumstances. It is the doing of something which a person of ordinary prudence and care would not have done under like or similar circumstances; or, it may be the failure to do something that a person of ordinary prudence or care would not have omitted to do under similar circumstances.

Negligence may also consist in the violation of a statute, such as the law of the road, governing one's conduct at certain times or places, unless such statute makes the violation merely *prima facie* negligence, in which latter case the violation of the statute has only the consequence attached to it by the statute.<sup>92</sup>

**Illinois**

The court instructs the jury, as a matter of law, that the defendant was not required to exercise toward the plaintiff the highest degree of care, but said defendant was only required to exercise toward said plaintiff ordinary care at the time and place of the accident in question, and ordinary care is such care as a person of ordinary prudence would exercise under the same or like circumstances, and just the same degree of care was required by law of plaintiff to avoid coming into collision with the defendant's truck. If the jury believe, from the evidence, that the defendant's servants exercised at the time and place in question, ordinary care to avoid injuring the plaintiff but that nevertheless the plaintiff was injured, then they should find the defendant not guilty.<sup>93</sup>

**Indiana**

(1) Negligence, which renders one liable to another who is injured thereby, is the doing of some act or thing which it is his duty to refrain from doing; or the failing to do some act or thing it is his duty to do. Or, to put it in other words, where a person does something which a reasonably careful and prudent person would not do under the same or like circumstances, or fails to do something which a reasonably careful and prudent person would have done under the same or like circumstances, it constitutes negligence; and where such negligent act is done or omitted and by reason of it another suffers injury therefrom, to which no negligence of his own contributed, such negligent person is liable to the injured person, he being without fault.<sup>94</sup>

<sup>92</sup> McCoy v Krengel, 52 Idaho 266, 17 P2d 547

255 IllApp 403. See also Scott v Vurdulas, 264 IllApp 495

<sup>93</sup> Kehr v Snow & Palmer Co,

<sup>94</sup> Cail v Harvey, Circuit Court,

(2) The question of reasonable care with respect to all parties depends wholly upon the situation before and at the time of the accident and not upon anything known or discovered afterwards, which could not with reasonable diligence have been known or discovered before the occurrence of the accident. Or, in other words, in the consideration of the evidence, you should put yourself in the position of the parties at the time of the occurrence and have in mind what each knew or ought to have known in the exercise of reasonable care at that time <sup>95</sup>

(3) The court can not determine, as a matter of law, under the facts as disclosed by the evidence in this case, whether either the defendant or the plaintiff was guilty of negligence, but it is your duty to determine such question under the rules given to you and according to the standard fixed in these instructions for determining the same. In determining whether the defendant was negligent, you have a right to consider any evidence as to the width of the street upon which he was driving, the character of the pavement thereon, the presence or absence of any buildings, trees, or other objects which might obstruct the view of the parties at the place in question; any evidence as to whether at the time of the accident it was light or dark; the condition of the weather, as to whether it was stormy or otherwise; the rate of speed at which the defendant at the time was traveling, if you find his automobile was in motion; whether any warning was sounded, or otherwise, the means, if any, available to defendant to stop his automobile in time to avoid the accident in question; the means, if any available to him to have turned his automobile to the one side or the other in time to have avoided the accident; and all other facts in evidence which will aid you as reasonable men to determine whether or not the defendant did or did not exercise ordinary care to avoid the accident and consequent injuries, if any complained of. <sup>96</sup>

#### Iowa

The court instructs the jury that the law requires that the driver of an automobile upon the public streets and highways must use reasonable care and caution for the safety of others, and what is reasonable care in this case is to be determined by the circumstances as shown by the evidence. <sup>97</sup>

#### Kansas

The degree of care required of both the plaintiff and the

Marion County, Indiana, No 45113  
See also Beard v Ball, 96 IndApp  
156, 182 NE 102

<sup>95</sup> United States Nat Bank v  
Davis, Superior Court, Lake County,

Indiana, No 2573

<sup>96</sup> Gobitz v Asher, Superior Court,  
Lake County, Indiana, No 21920

<sup>97</sup> McLaughlin v Griffin, 155 Ia  
302, 135 NW 1107

defendants in this case, in the operation of their respective vehicles was what is termed reasonable care. Reasonable care is such degree of care for the avoiding of collisions, as a reasonably prudent and careful driver of such vehicles would exercise under all the surrounding circumstances as disclosed by the evidence. Care, which would be reasonable under one set of circumstances, might not be such under all circumstances. One set of circumstances might demand but slight care and yet be termed reasonable, while another might demand the highest possible degree of human skill and foresight in order that it may be termed reasonable. In order to determine whether reasonable care was used by the operators of the vehicles involved in this case, the nature of the vehicle, as to size, weight and manner of construction and control, the nature of the roadway, the extent and nature of travel thereon, the likelihood of an emergency calling for quick action, or the absence thereof, in view of the entire evidence, should be taken into consideration by the jury.<sup>98</sup>

#### Kentucky.

(1) Every adult, regardless of his age, experience, or discretion, should exercise such care as is usually exercised by ordinarily prudent persons in the same or similar circumstances.<sup>99</sup>

(2) Ordinary care means that degree of care usually exercised by ordinarily careful and prudent persons under like circumstances.<sup>1</sup>

#### Maryland

Unless you find from the evidence that the defendant's servant, in the management of the truck, failed to use such diligence and care as prudent and discreet persons would exercise on a like occasion with such truck, then the plaintiff is not entitled to recover, and the verdict of the jury must be for the defendant.<sup>2</sup>

#### Massachusetts.

In determining whether the conduct of the defendant is proper or improper, you are first to say: What would the ordinarily careful and prudent man do under those circumstances,

<sup>98</sup> *Leimbach v Pickwick Greyhound Lines, Inc.*, 135 Kan 40, 10 P2d 33.

<sup>99</sup> *Fork Ridge Bus Line v Matthews*, 248 Ky 419, 58 SW2d 615

<sup>1</sup> *Golubic v Rasnick*, 239 Ky 355, 39 SW2d 513

See also *Deshazer v Cheatham*,

233 Ky 59, 24 SW2d 936

<sup>2</sup> *American Exp Co v Terry*, 126 Md 254, 94 A 1026, AnnCas 1917C, 650 See also *Ottenheimer v Molohan*, 146 Md 175, 126 A 97, *Yellow Cab Co v Lacy*, 165 Md 588, 170 A 190

how would he perform? And when you have said what his conduct would be, then you compare the conduct of the defendant with that conduct, and by that comparison you say whether the conduct in this particular case was negligent or not.<sup>3</sup>

#### Michigan

A person operating an automobile must use that degree of care which a reasonable person of ordinary prudence would exercise under the same or similar conditions. He is bound to exercise care commensurate with the danger naturally incident to the use of such automobile. In some situations, greater care is required than in others, depending upon all of the circumstances which then exist and are present. A driver is required to use such care as is commensurate with the circumstances and conditions, the frequency or infrequency of travel, the time of the day or night, the traffic on the highway, and all the surrounding circumstances and conditions attending the time and place of the accident.<sup>4</sup>

#### Missouri

(1) The court instructs the jury that under the law of the state of Missouri it is the duty of every person operating a motor vehicle upon the highways of this state to drive the same in a careful and prudent manner and to exercise the highest degree of care and at such a rate of speed so as not to endanger the life or limb of any person, and you are instructed that the term "highest degree of care" means such care as would ordinarily be exercised by a very careful and prudent person under the same or similar circumstances.<sup>5</sup>

(2) Due care is ordinary care. Ordinary care is defined as the care that would be exercised by a reasonably prudent person under the same or similar circumstances.<sup>6</sup>

#### Montana

(1) A driver is required to operate his automobile in a careful and prudent manner under the conditions existing at the point of operation, taking into account the amount and character of traffic, the grade and width of the highway, condition of the surface, and freedom of obstruction to view ahead, and so as

<sup>3</sup> *Learned v Hawthorne*, 269 Mass 554, 169 NE 557

<sup>4</sup> *Gibbs v Guild*, 332 Mich 671, 52 NW2d 542

<sup>5</sup> *Buck v Thatcher*, 222 MoApp 1036, 7 SW2d 398

See also *Sullivan v Union Elec*

*Light & Power Co*, 331 Mo 1065, 56 SW2d 97, *Robertson v Scoggins* (MoApp), 73 SW2d 430, *Riner v Riek* (MoApp), 57 SW2d 724

<sup>6</sup> *Wilson v Chattin*, 335 Mo 375, 72 SW2d 1001

not to unduly or unreasonably endanger the life, limb, property, or other right of any person entitled to use the highway <sup>7</sup>

(2) You are instructed that in Montana every person is responsible for an injury occasioned to another by his want of ordinary care or skill, in the management of his property or person, except so far as the latter has, by want of ordinary care, brought the injury upon himself. <sup>8</sup>

#### Nebraska

The court instructs the jury that the care which may be termed "ordinary" is such a degree of care as a prudent and reasonable man would exercise under the existing circumstances and conditions <sup>9</sup>

#### New Jersey

Every person having occasion to use the public highways of the state is entitled to feel that he is absolutely safe, while using ordinary care, and, if one negligently renders its ordinary use dangerous, he is lawfully answerable for injuries resulting therefrom to a lawful user of such highway. <sup>10</sup>

#### New York

So, gentlemen of the jury, the courts have laid down what is the rule to be applied in cases such as this Did the driver of the car in view of all the circumstances that existed at the time he arrived at Mott and Bayard streets, exercise that degree of care that a reasonably prudent careful driver would have exercised under like circumstances? <sup>11</sup>

#### North Carolina

The law does not require a man to become an insurer or guarantor, what the law requires him to do is to exercise reasonable care in the operation of his automobile, and due care is the better word, and due care means that care which an ordinarily prudent person, surrounded and situated as the driver was there on that occasion, would have exercised. \* \* \* And if defendant's driver in the operation of his truck exercised that care which an ordinarily prudent person, surrounded and situated as he was at the time, would have exercised, then he would not be guilty of any negligence But if he failed to exercise such care, and you find that failure was the proximate

<sup>7</sup> McGregor v Weinstein, 70 Mont 340, 225 P 615

<sup>8</sup> Mellon v Kelly, 99 Mont 10, 41 P2d 49

<sup>9</sup> Schrage v Miller, 123 Neb 266, 242 NW 649

<sup>10</sup> Butler v Jersey Coast News

Co, 109 NJL 255, 160 A 659 See also Dumphy v Thompson (NJ Sup), 3 NJMiscR 1036, 130 A 639

<sup>11</sup> Connell v Berland, 223 AppDiv 234, 228 NYS 20, affd in 248 NY 641, 162 NE 557

cause of the injury to the plaintiff's car, then it would be your duty to answer the first issue, "Yes." <sup>12</sup>

#### North Dakota

The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own. <sup>13</sup>

#### Ohio

The law further provides that drivers of motor vehicles must operate such vehicles on the public roads or highways with due regard for the safety and rights of drivers and occupants of all other vehicles and must not endanger the life or property of any other person while in the lawful use of the roads, and you are instructed that the failure on the part of any driver of a motor vehicle to drive in accordance with this rule of law would constitute negligence. <sup>14</sup>

#### Oklahoma

One who operates an automobile on a public highway owes to other drivers on said highway, the duty of controlling, operating and driving said automobile carefully, so as to avoid causing needless injury, and in the performance of that duty, is bound to take all precautions which reasonable care requires under the circumstances <sup>15</sup>

#### Oregon

Negligence is defined to be the want of ordinary care; that is, such care as an ordinarily prudent person would exercise under like circumstances, and it should be proportioned to the danger and peril reasonably to be apprehended from a lack of the proper prudence. A person must use his faculties in proportion to the danger of his employment, and must use every reasonable precaution to provide for his safety, such as an ordinarily prudent man under the same circumstances would use. <sup>16</sup>

#### Pennsylvania

Now, "negligence" is the absence or want of care; such care as men of ordinary prudence would use. That is the general definition of negligence. And, therefore, if you should find that there was want of care on the part of Mr. S., such ordinary

<sup>12</sup> DeLaney v Henderson-Gilmer Co., 192 NC 647, 135 SE 791

<sup>13</sup> Kertz v Skjeveland, 56 ND 351, 217 NW 529

<sup>14</sup> Sweeney v Schneider, 73 Oh App 157, 53 NE2d 820

<sup>15</sup> Skaggs v Gypsy Oil Co., 169

Okl 209, 36 P2d 865

<sup>16</sup> White v East Side Mill & Lbr Co., 84 Or 224, 161 P 969, 164 P 736  
See also Biddle v. Mazzocco, 204 Or 547, 284 P2d 364, Snabel v Barber, 137 Or 88, 300 P 331



care as a man ought to use, and you should find that there was no want of care on the part of the plaintiff that contributed to the accident, then your verdict would be in favor of the plaintiff <sup>17</sup>

#### South Carolina.

What is negligence? Negligence is the failure to exercise due care. The law enjoins upon every individual, you and me and every individual, each in our conduct with reference to anybody else, the duty of exercising due care under all of the circumstances attending our activities, and the failure to exercise that due care which the surrounding circumstances justly require is called negligence, and if one is injured by reason of that negligence, if that negligence itself, that failure to exercise due care under the circumstances, is the direct cause of bringing about some injury or damage to the person of another, then that negligence we call actionable. If one is injured, due directly and proximately to the negligence of another, he can come into court and assert his rights and recover against another predicated upon that negligence as the direct cause of his injury. Negligence in order to be actionable negligence, in order to support an action at law, such as this is, must be shown to have been the direct and proximate cause of the injury complained of. A pleader comes into court and grounds his claim for recovery upon allegations of negligence, he is bound by his pleading, he must show to the satisfaction of the jury that the things which he charges as negligence were negligent and that those things so charged were the direct and proximate cause of any such injury as he may have sustained. <sup>18</sup>

#### South Dakota

In this action the boy, M. K., by his guardian ad litem brings suit against the defendant, C. N. M., claiming to recover for personal injuries concerning which testimony has been submitted before you. The mere fact that the boy was injured by an automobile does not entitle him to recover. He can only recover in case the jury believe from all the testimony that that collision, resulting in some injury to him, was caused by negligent conduct on the part of the defendant in driving his automobile, and that the plaintiff himself was not guilty of any contributory negligence. A person driving an automobile in the streets is under obligation to exercise the care of an ordinarily prudent person in like circumstances and conditions. If he

<sup>17</sup> Pickering v Snyder, 270 Pa 139, 113 A 375

<sup>18</sup> Parker v Simmons, 163 SC 42, 161 SE 169. See also King v Holli-

day, 116 SC 463, 108 SE 186, Southern v Cudahy Packing Co, 160 SC 496, 159 SE 32

exercised the same care and prudence of an ordinarily prudent man in running that automobile, and notwithstanding his care, some injury resulted, he is not responsible, and a verdict should not be rendered against him. Therefore, one of the principal questions, and really the principal question, for you to determine is whether, under all the facts and circumstances of the case, the defendant was exercising the care a reasonably prudent man should exercise, under all the circumstances, in the driving of this automobile at that time.<sup>19</sup>

#### Tennessee

The defendant, H. C., had the right to drive his car along Jackson Highway at the time and place where the accident occurred, however he had no exclusive right to use the highway and it was his duty while using the highway and even while driving upon the right-hand side thereof, to exercise ordinary care and prudence, under all the surrounding facts and circumstances, to avoid injuring others who might be in or upon said highway and using the same.<sup>20</sup>

#### Texas

In determining whether an adult charged therewith is guilty of negligence, it is always necessary to determine the care exercised by him. The care required to free him of the charge is that which a person of ordinary prudence would exercise under the same or similar circumstances.<sup>21</sup>

#### Vermont

It was the duty of the defendant to use the care and prudence of a prudent man in view of all the circumstances to avoid injuring the plaintiff. No certain and unbending rule as to what constitutes negligence can be established for all possible contingencies. What may be prudent under some circumstances and at some times, may be negligent under other circumstances and at other times. The standard, which is an elastic one, is that of a prudent man—what such a man would do and would foresee under such circumstances as those in question in this case.<sup>22</sup>

#### Washington

Negligence consists in the doing of an act, or a series of acts, without the exercise of reasonable care, or in doing an

<sup>19</sup> *Kriens v McMillan*, 42 SD 285, 173 NW 731. See also *Griebel v Ruden*, 62 SD 469, 253 NW 447, for former opinion see 61 SD 507, 249 NW 810.

<sup>20</sup> *Caldwell v Hodges*, 18 Tenn App 355, 77 SW2d 817.

<sup>21</sup> *Yellow Cab & Baggage Co v Smith* (TexCivApp), 30 SW2d 697. See also *Stedman Fruit Co v Smith* (TexCivApp), 28 SW2d 622.

<sup>22</sup> *McAndrews v Leonard*, 99 Vt 512, 134 A 710.

act, or acts, in violation of an express law or ordinance Reasonable care is that degree of care that a reasonably careful and prudent person would use under similar circumstances.<sup>23</sup>

#### West Virginia

The court instructs the jury that negligence, as spoken of in the court's instructions, means the failure to use such care and caution as a reasonably prudent man would ordinarily have used in the conduct of his own affairs under the circumstances shown in the evidence<sup>24</sup>

#### Wisconsin

(1) In this case an automobile operator was negligent if, without intending to do any wrong, he did such an act or omitted to take such precaution that, under the circumstances present at the time, he, as an ordinarily prudent, intelligent automobile operator, ought reasonably to have foreseen that damage or injury might probably result from his conduct.

Negligence is sometimes also defined as a failure to use that degree of care and caution which is ordinarily used by the majority of persons acting under the same or similar circumstances The majority of persons usually so act and take such precautions in operating and in riding in automobiles that, under the circumstances present at the time, they create no reasonable cause for foreseeing that damage or injury might probably result from their conduct<sup>25</sup>

(2) Where there are no statutory regulations, it is nevertheless the duty of every automobile operator to keep a careful lookout for dangers and to so operate his car that he does not endanger the life, limb or property of any other person In other words, he is charged with the duty to so operate, manage and control his car that under the circumstances present, he creates no reasonable cause to foresee that personal injury or damage might probably result from his conduct Failure to perform this duty constitutes negligence.<sup>26</sup>

<sup>23</sup> Jaquith v Worden, 73 Wash 349, 132 P 33, 48 LRA (NS) 827 See also Edwards v Lambert, 121 Wash 380, 209 P 694, Lindsey v Elkins, 154 Wash 588, 283 P 447, Alexiou v Nokas, 171 Wash 369, 17 P2d 911

<sup>24</sup> Collar v McMullin, 107 WVa 440, 148 SE 496

<sup>25</sup> Hamus v Weber, 199 Wis 320, 226 NW 392 See also Johanson v Webster Mfg Co, 139 Wis 181, 120

NW 832, Wickert v Wisconsin Cent R Co, 142 Wis 375, 125 NW 943, 20 AnnCas 452, Brossard v Morgan Co, 150 Wis 1, 136 NW 181, Bell Lbr Co v Bayfield Transfer R Co, 169 Wis 357, 172 NW 955, Koehler v Waukesha Milk Co, 190 Wis 52, 208 NW 901

<sup>26</sup> Seefeldt v Peterson, Circuit Court, Lincoln County, Wisconsin, see 200 Wis 644, 227 NW 549

### § 328. — Right to use highway.

#### California.

The court instructs the jury that a public highway is open in all its length and breadth to the reasonable common and equal use of the people on foot or in vehicles. The owner of an automobile has the same right as the owner of other vehicles to use the highway, and he must exercise reasonable care and caution for the safety of others.

A traveler on foot has the same right to the use of the public highway as an automobile or other vehicle. In using such highway, all persons are bound to use reasonable care to prevent accidents. Such care must be in proportion to the danger in each case. The person having the management of the automobile and the travelers on foot are both required to use reasonable care, circumspection, prudence, and discretion as the circumstances require. Both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances.<sup>27</sup>

#### Delaware

The owner of an automobile has the same right as the owner of other vehicles to use the highways or streets of a city.<sup>28</sup>

#### Illinois

The court instructs the jury that an owner of an automobile has the right to use the highway of this state, provided, in using it, he uses reasonable care and caution for the safety of others, and does not violate the law of the state.<sup>29</sup>

#### Indiana

You are instructed that automobiles and motor-trucks have equal rights to travel upon the public highways and the drivers of each must use reasonable and ordinary care to avoid injuring the other vehicle.<sup>30</sup>

#### Missouri

The court instructs the jury that the defendant was not entitled to the exclusive use of Lindell Boulevard between Grand Boulevard and Channing Avenue. It was the duty of defendant in using said street at said place to operate its motor-bus thereon in a careful and prudent manner and to exercise the highest care,

<sup>27</sup> Brown v Beck, 63 CalApp 686, 220 P 14

NE 1035, 1 LRA (NS) 215, 108 AmSt 196

<sup>28</sup> Grier v Samuel, 4 Boyce (27 Del) 106, 86 A 209

<sup>30</sup> Koplovitz v Jensen, Superior Court, Lake County, Indiana, No 19928, see 197 Ind 475, 151 NE 390

<sup>29</sup> Christy v Ellhott, 216 Ill 31, 74

and in the exercise of such care, it was the duty of defendant to be on the watch for vehicles on said street in the path of said motor-bus or approaching said path.<sup>31</sup>

#### Montana

You are instructed that a pedestrian and a driver have equal rights in the use of a public highway, and neither may, with propriety, infringe upon or disregard the rights of the other. The pedestrian must use ordinary care for his own safety.<sup>32</sup>

#### Tennessee

The defendant, H C., had the right to drive his car along the Jackson Highway at the time and place where the accident occurred, however, he had no exclusive right to use the highway and it was his duty while using the highway and even while driving upon the right-hand side thereof, to exercise ordinary care and prudence under all the surrounding facts and circumstances to avoid injuring others who might be in or upon said highway and using the same.<sup>33</sup>

#### Washington.

The right of way is only a relative right, and, once a driver entitled thereto undertakes to exercise that right, he can not abandon it without regard for the rights of others<sup>34</sup>

#### Wisconsin

The operator is entitled to use and drive his car in the ordinary and usual manner and as men of ordinary prudence usually drive under like circumstances. He is not bound at his peril to see everything that is in the highway or at the side of the highway, nor is he bound to anticipate that which is unusual or extraordinary. If he exercises ordinary care to maintain a sufficient lookout, he has done his full duty in this respect<sup>35</sup>

### § 329. — Duty to anticipate presence of others on highway or street.

#### California

(1) I instruct you that it is part of the duty of an operator of a motor vehicle to use ordinary care to keep his machine always under control so as to avoid collision with other persons

<sup>31</sup> Nash v People's Motorbus Co of St Louis (MoApp), 20 SW2d 570

<sup>32</sup> Pierce v Safeway Stores, Inc, 93 Mont 560, 20 P2d 253

<sup>33</sup> Caldwell v Hodges, 18 Tenn App 355, 77 SW2d 817.

<sup>34</sup> Sebern v Northwest Cities Gas Co, 167 Wash 600, 10 P2d 210

<sup>35</sup> Ferge v Schuetz, Circuit Court, Marathon County, Wisconsin, see 195 Wis 662, 217 NW 656

lawfully using the highway and who are themselves in the exercise of ordinary care. He has no right to assume that the road is clear.

Accordingly, if the operator of the vehicle should, in the exercise of ordinary care, have become aware of the presence of another in time to have avoided colliding with such other person, then the fact that he failed to become aware of the presence of the other is no excuse for conduct which would have amounted to recklessness if he had known of the presence of such person <sup>36</sup>

(2) The driver of an automobile has no right to assume that the road is clear, but under all circumstances and at all times must be reasonably diligent and must anticipate the presence of others lawfully upon the street <sup>37</sup>

#### Maryland

One who operates a motor vehicle upon a public highway at night is bound to constantly observe the highway in front of him so as to discover persons and other vehicles thereon and avoid colliding with them, and to keep his motor vehicle under such control that he may readily operate or stop it to avoid such collision. The operator of a motor vehicle is bound to see what he could have seen if he had exercised due care under the circumstances, then existing, and if, in this case, you find that the operator of the motor tractor-trailer of the defendant could, by the exercise of due care under all of the circumstances then and there existing, have seen the deceased and his automobile in time to have so operated the tractor-trailer as to have stopped it in time to have avoided the collision, and failed to do so, and if you further find that as a result of such failure the tractor-trailer collided with the deceased and his automobile, then under the law the defendant would be considered negligent in so operating its tractor-trailer as to cause such collision <sup>38</sup>

#### Michigan

A driver is obliged to take notice of conditions before him, and if it is apparent that by reason of some particular mode of proceeding he is liable to work an injury, it is his duty to adopt some safer method, if by reasonable care and prudence he can do so. The driver of an automobile is bound to anticipate that he will meet other vehicles and pedestrians at any point in the street, and he must keep a proper lookout for them and keep

<sup>36</sup> *Morris v Purity Sausage Co*,  
2 CalApp2d 536, 38 P2d 193

<sup>38</sup> *Victor Lynn Lines, Inc v State*,  
for use of Pursel, 199 Md 468, 87

<sup>37</sup> *Halaminsky v Nelson*, 5 Cal  
App2d 287, 42 P2d 676

his car under such control as will enable him to avoid a collision with any other person using due care and caution <sup>39</sup>

#### Oklahoma

An operator of a motor vehicle, while driving on a highway, has no right to assume that the road is clear, but must under all circumstances be vigilant and must anticipate and expect the presence of others at places where other vehicles are constantly using the highway <sup>40</sup>

#### Washington

If you find from the evidence that the street at the point of the collision was generally traveled, W. was bound to anticipate that persons and vehicles might be traveling thereon <sup>41</sup>

### § 330. — Proper lookout; duty to use other faculties to avoid dangers and injuries. <sup>42</sup>

#### Arizona

The fact that travel on the highway, when the vision is poor or obscured by reason of dust in the air and the glare of headlights, is attended with danger, is an admonition to the driver as well as the pedestrian to proceed with greater caution and care than if these conditions did not exist <sup>43</sup>

#### Arkansas

Ordinary care requires of every man who drives a motor vehicle upon a public street to keep a lookout for vehicles or persons who may be upon the street, and to keep his motor vehicle under such control as to be able to check the speed or stop it absolutely, if necessary, to avoid injury to others when danger may be expected or is apparent <sup>44</sup>

#### California

(1) If you find from the evidence that the defendant S. F. (driver of car) could have avoided this accident by the exercise of ordinary care in using his senses of sight and hearing to discover the presence of the bus and in preventing his automobile from colliding with the bus, then you must find for the plaintiff J M and against the defendant S F <sup>45</sup>

<sup>39</sup> Gibbs v Guild, 332 Mich 671, 52 NW2d 542

<sup>40</sup> Cushing Ref & Gasoline Co v Deshan, 149 Okl 225, 300 P 312

<sup>41</sup> Jaquith v Worden, 73 Wash 349, 132 P 33, 48 LRA (NS) 827

<sup>42</sup> See also § 346, *infra*

<sup>43</sup> Coe v Hough, 42 Ariz 293, 25 P2d 547

<sup>44</sup> Smith Arkansas Traveler Co v Simmons, 181 Ark 1024, 28 SW2d 1052 See also Roark Transp, Inc v Sneed, 188 Ark 928, 68 SW2d 996

<sup>45</sup> Mazzotta v Los Angeles R Corp (CalApp), 145 P2d 662, subsequent opinion, 25 Cal2d 165, 153 P2d 338

In the case cited, plaintiff, a pas-

(2) General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either some part of such evidence is untrue or the person was negligently inattentive.<sup>46</sup>

(3) If his negligence is proved, it is no excuse for the defendant to say that he did not know of the presence of another automobile on the street, or that it was not seen by him in time to avert a collision. It is the duty of a driver when his view is unobstructed to see automobiles on the road in front of his machine.<sup>47</sup>

#### Connecticut.

(1) A traveler on the highway is charged with seeing what is reasonably observable. He is presumed to have seen what he reasonably could have seen.<sup>48</sup>

(2) Of course, the operator of a motor vehicle must keep a reasonable lookout, and he must be vigilant to detect anyone or anything in the path of his moving vehicle who is likely to suffer any injury from it. It is his duty to look out and see what there is for him to see. He cannot excuse himself from injuring another person on the highway by saying that he did not see him, if, under the circumstances, he would have seen him had he been using reasonable care.<sup>49</sup>

#### Georgia

If a person operating a motor vehicle chooses on a dark, rainy night to use the left-hand side of the road, it is his duty to be on the alert, use his eyes, his ears, and all of his senses to exercise care and caution to prevent injury either to himself or to other persons lawfully entitled to use the road.<sup>50</sup>

#### Idaho

Plaintiff's case is based upon negligence, and negligence is the failure to use ordinary care. Ordinary care on the part of

senger in the bus, recovered a verdict against the bus company and the driver of an automobile which collided with the bus. An order granting a new trial was reversed.

<sup>46</sup> *Chadek v. Spira*, 146 CalApp2d 360, 303 P2d 879.

<sup>47</sup> *Evans v. Mitchell*, 2 CalApp2d 702, 38 P2d 437.

<sup>48</sup> *Hill v. Way*, 117 Conn 359, 168 A 1. See also *Murphy v. Adams*, 99 Conn 632, 122 A 398.

<sup>49</sup> *Brangi v. Connecticut Motor Lines, Inc.*, 134 Conn 562, 59 A2d 295.

<sup>50</sup> *Roberts v. Phillips*, 35 GaApp 743, 134 SE 837, *affd in Phillips v. Roberts*, 166 Ga 897, 144 SE 651.



the driver of a motor vehicle requires that his rate of speed shall not be greater than that at which he can retain control of the vehicle and keep it on the right side of the road. Ordinary care also requires that the driver shall keep a lookout for approaching cars and watch the road ahead with due regard to the kind and character of the road, the amount of travel to be expected thereon and the condition of the road at the time in question.<sup>51</sup>

#### Indiana.

(1) It is the duty of a driver of an automobile to look where he is going, but it can not be laid down as an inflexible and unvaried rule that under any and all circumstances he must always keep his eyes constantly fixed on the roadbed. Nor is he chargeable with notice of every obstruction thereon which could be detected by such constant scrutiny. He is chargeable, however, with notices of such obstructions as he should have seen if he had been exercising reasonable care and caution and making reasonable use of his faculties although he may not in fact have seen them.<sup>52</sup>

(2) One who operates an automobile upon a public highway is bound to observe the highway in front of him so as to discover other vehicles or pedestrians thereon, and avoid colliding therewith, and to keep his automobile under such control that he may readily operate or stop the same to avoid a collision and possible injury to other persons. He is bound to see what he could have seen if he had exercised due care under the circumstances and if, in this case you find that the defendant could have seen the plaintiff with whom he collided in time to have so operated his automobile or to have stopped the same in time to have avoided a collision with the plaintiff by the exercise of due care and caution required by the particular circumstances, and you also find that he did so collide with the plaintiff, then he was negligent in so operating his automobile as to cause such collision, and the plaintiff was not guilty of contributory negligence, your verdict should be for the plaintiff.<sup>53</sup>

#### Kansas

You are instructed that it is the duty of anyone using a public street, either as a foot passenger or in driving an automobile thereon, to look ahead and see whatever there may be in

<sup>51</sup> McCoy v Krengel, 52 Idaho 19928, see 197 Ind 475, 151 NE 390  
626, 17 P2d 547

<sup>53</sup> McClure v Miller, 229 Ind 422,

<sup>52</sup> Koplovitz v Jensen, Superior 98 NE2d 498  
Court, Lake County, Indiana, No

the line of his or her vision which should affect the use of said street, and such person is in law presumed to have seen what he could or should have seen, had he kept a proper lookout <sup>54</sup>

#### Kentucky

It was the duty of the defendant at the time and place mentioned in the evidence to have his truck under reasonable control, to operate it at a reasonable rate of speed, having regard for the traffic conditions and the use of the highway, and to keep a lookout for persons and vehicles upon the streets <sup>55</sup>

#### Michigan

(1) Every person is charged with seeing what is in plain sight and which could be seen if he had looked. <sup>56</sup>

(2) If you find from a preponderance of the testimony that the accident was caused because the driver was not looking ahead, and that if he had looked ahead he would have seen the boy and could have stopped the car, to have avoided the accident, then the defendant would be liable, it would make no difference in such case whether he was going 10 miles an hour or less, if, by looking, he could have seen the boy, and had plenty of opportunity to have stopped and avoided the accident. He would be guilty of negligence if he failed to look and see the boy. <sup>57</sup>

#### Mississippi

The court instructs the jury for the plaintiff that the defendant M. was under the duty not merely to drive the Buick automobile so as to be able to stop within the range of her vision, but she was also under the duty to drive the Buick automobile in such manner that she could actually discover an object, perform the manual acts necessary to stop, and bring the automobile to a complete halt, if necessary, to avoid collision with others on or near the highways, and if you believe from a preponderance of the evidence in this case that Miss M. was not driving the Buick automobile so as to be able to avoid such a collision, then, in that event, Miss M. was negligent, and if you further believe from a preponderance of the evidence that such negligence, if any, proximately contributed to the happening of the accident, giving rise to the plaintiff's damages, it is your sworn duty to find for the plaintiff <sup>58</sup>

<sup>54</sup> Coughlin v Layton, 104 Kan 752, 180 P 805

<sup>55</sup> Golubic v Rasnick, 239 Ky 355, 39 SW2d 513

<sup>56</sup> Essenberg v Achterhof, 255 Mich 55, 237 NW 43

<sup>57</sup> Werney v Reid, 219 Mich 257, 189 NW 30

<sup>58</sup> Canale v Jones, 228 Miss 317, 87 S2d 694

**Missouri**

Not to see what is plainly visible when there is a duty to look constitutes negligence.<sup>59</sup>

**New York**

Where two vehicles are approaching each other on a street in daylight, and there is no obstruction to the view between them, and no excusing circumstances, a driver of one vehicle is negligent if he does not see the other vehicle. If he had looked he must have seen.<sup>60</sup>

**North Carolina**

It was his duty to keep a reasonable and proper lookout in the direction in which he was going, to be advertent to the traffic on the street, which in the exercise of due care he could have seen and anticipated.<sup>61</sup>

**North Dakota**

A person driving an automobile or a truck upon the street must keep a careful lookout ahead for the purpose of avoiding injury to persons and property, and a person traveling upon the street must keep a lookout, a reasonable lookout in all directions, that is to say, both sides of the street or highway he is traveling. If he is traveling upon a street or highway that is built up with residences or public buildings, and if, as in this case, he is passing a public school that is in session at that time and being attended by pupils, this lookout must be continuously kept up with a view to avoiding, as I said before, any injury or damage to any person or property.<sup>62</sup>

**Oregon.**

The statute does not require that at intersections the driver on the left shall constantly gaze fixedly towards his right. On the other hand, however, it is negligence per se for such a driver to look exclusively to the left while in the zone of danger.<sup>63</sup>

**Texas.**

The law charges all persons approaching and about to enter street intersections to keep a reasonable and proper lookout.<sup>64</sup>

<sup>59</sup> Woods v Moore (MoApp), 48 SW2d 202

<sup>60</sup> Rounds v Fitzgerald, 207 App Div 534, 202 NYS 595, affd in 239 NY 568, 147 NE 199

<sup>61</sup> Alexander v Southern Public Utilities Co, 207 NC 438, 177 SE 427

<sup>62</sup> Kalsow v Grob, 61 ND 119, 237 NW 848

<sup>63</sup> Ramp v Osborne, 115 Or 672, 239 P 112

<sup>64</sup> Jimmie Guest Motor Co v Olcott (TexCivApp), 26 SW2d 373.

**Washington**

If you find from the evidence that defendant was blinded by the headlight of an approaching street car, you should determine in view of all the attending circumstances, shown by the evidence, whether it was his duty to stop his machine and not proceed until he could see the street and objects ahead, and if he failed to do so, whether such failure was negligence.<sup>65</sup>

**Wisconsin**

(1) You are instructed that it is the duty of a driver of an automobile to keep a reasonable lookout for other travelers upon the highway, and to exercise ordinary care with respect to the management and control of his automobile so that he may, under the ordinary circumstances, avoid colliding with and injuring other travellers upon the highway. One is bound to see that which is in plain sight and may not be heard to say to the contrary. A driver cannot excuse himself from his duty by saying that he looked and did not see, when, as a matter of fact, he would have seen an approaching automobile if he had looked. Under the circumstances it is assumed that he did not look or that he plunged heedlessly ahead regardless of the hazard and consequences.<sup>66</sup>

(2) In order to exercise ordinary care one must employ his faculties in order to observe and discover the danger, if the danger is visible and obvious, or if the surrounding circumstances and conditions are such as to indicate the presence of danger to a reasonable or ordinarily careful and prudent man, and a failure to discover such visible and obvious danger, when their attention is not attracted suddenly away from them, amounts to want of ordinary care.<sup>67</sup>

**§ 331. — Relying on care of another.****Alabama**

(1) The court charges the jury that the defendant, B., had the right to assume that the plaintiff was in possession of all his faculties.<sup>68</sup>

(2) The driver of an automobile is entitled to assume that an apparently competent person, riding a bicycle along the road and in a place of safety, will continue, after being warned of the approach of the automobile, to remain in a place of safety, and

<sup>65</sup> Jaquith v Worden, 73 Wash 349, 132 P 33, 48 LRA (N S) 827

<sup>66</sup> Weber v Mayer, 266 Wis 241, 63 NW2d 318

<sup>67</sup> Vanden Heuvel v Schultz, 182 Wis 612, 197 NW 186

<sup>68</sup> Vansandt v Brewer, 209 Ala 131, 95 S 463

such driver, if in the exercise of due care in the driving of such automobile, is under no duty to stop or slacken his speed until it becomes reasonably apparent that such person riding on the bicycle is not going to remain in a place of safety.<sup>69</sup>

#### California.

(1) A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury (or accident) which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.<sup>70</sup>

(2) You are instructed that a driver has no right to assume that the road is clear, but under all circumstances and at all times he must be most vigilant and must anticipate the presence of others. The fact that he did not know that anyone was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway.

I further instruct you that a person lawfully and carefully driving upon a highway has the right to assume that all persons using the highway will also use ordinary care and caution. This rule allows drivers of motor vehicles to assume that motor-vehicle drivers will obey and abide by the traffic laws and regulations.<sup>71</sup>

#### Indiana

(1) Every one has the right to presume that a person will obey the law and that another in possession of his faculties will exercise reasonable care for the safety of himself and his property proportionate to the danger of which such person has knowledge or which by reasonable care he could know of. Also, every one has the right to believe that another person of mature age and in possession of his faculties will exercise reasonable care not to injure him or his property and all these presumptions

<sup>69</sup> Crescent Motor Co v Stone, 208 Ala 137, 94 S 78

<sup>70</sup> Chadek v Spira, 146 CalApp2d 360, 303 P2d 879

See also Pinello v Taylor, 128 Cal

App 508, 17 P2d 1039, Cummins v Yellow & Checker Cab Co, 127 Cal App 170, 15 P2d 536

<sup>71</sup> Mathews v Dudley, 212 Cal 58, 297 P 544, corrected, 298 P 819.

may be entertained until it becomes apparent that such persons are not exercising such care <sup>72</sup>

(2) Each of the parties hereto was required to exercise the reasonable care of an ordinarily prudent person, and either party had the right to assume that the other would do the duty required of him, and he would have had the right to act on that assumption. <sup>73</sup>

#### Iowa

(1) In arriving at your verdict in this case, you will take into consideration the fact that the driver of each of the automobiles in question in this case had the right to assume that the other would not violate the law of the road, as set forth in these instructions, and each had the right to assume that the other would exercise ordinary care in the use and operation of his automobile at the time and place of the accident in question.

(2) In the use of the streets, the operator of an automobile has the right to assume that others operating automobiles will exercise the care and caution required of them for their own safety and protection and for the safety and protection of others, who in the exercise of ordinary care, might be using the streets at the same time and place, and he is not called upon to anticipate negligence on the part of the driver of another automobile while so using the streets <sup>74</sup>

#### Kansas

A motorist should exercise every reasonable precaution to insure safety of others traveling on the highway, but the motorist may assume others using the highway will exercise ordinary care and will always be alert to avoid collision. <sup>75</sup>

#### Michigan

A person operating an automobile in a public highway, exercising reasonable care, may assume that others using the highway will also act with reasonable care, and he is not negligent in acting accordingly. He has a right to assume that the drivers of other vehicles will observe the law of the road, and he is not guilty of negligence in acting upon such assumption, unless he has or should have, knowledge to the contrary. However, if the driver, by the use of ordinary care, should see that another is

<sup>72</sup> *Koplovitz v Jensen*, Superior Court, Lake County, Indiana, No 19928, see 197 Ind 475, 151 NE 390

<sup>73</sup> *Elgin Dairry Co v Shepherd*, 183 Ind 466, 108 NE 234, 109 NE 353

<sup>74</sup> *Shutes v Weeks*, 220 Ia 616,

262 NW 518 See also *Appleby v Cass*, 211 Ia 1145, 234 NW 477

<sup>75</sup> *Anderson v Thompson*, 137 Kan 754, 22 P2d 438 See also *Coughlin v Layton*, 104 Kan 752, 180 P 805.

not in the exercise of ordinary care, he is no longer entitled to rely upon this assumption and he must take such reasonable measures as he can under the circumstances to prevent injury. The mere fact that the driver of an automobile fails in his duty towards another, does not justify the other in proceeding in asserting his rights where he has or should have knowledge of that fact.<sup>76</sup>

#### Nebraska

The driver of an automobile upon the public highways is required to have his automobile under such reasonable control as will at all times enable him to avoid collision with other vehicles lawfully [and with ordinary care] on the highway, but the law does not require such driver to anticipate negligence or violation of traffic regulations by another, in the absence of notice, warning or knowledge of such condition.<sup>77</sup>

#### Oregon

(1) If a driver sees an automobile approaching his car in a manner likely to cause a collision, he should do all he can to avoid that collision, but, unless such a condition appears, one has a right to assume that all drivers of automobiles will obey the law of the road, and he is not bound to anticipate that any one is going to disobey it.<sup>78</sup>

(2) It is a rule of law that no person need anticipate negligence on the part of any other person, and a motor vehicle operator may at all times assume, until he has notice to the contrary, or until by the exercise of due care on his part he should and would have known to the contrary, that other persons using the highway will exercise due care and observe the law and to act accordingly. If you find that the defendant in this case was proceeding in a careful and prudent manner, considering the conditions existing at the time, then he had a right to assume that plaintiff's automobile would be doing likewise, in the absence of notice to the contrary or by exercise of due care on his part he should and would have known to the contrary, and the defendant was not required to anticipate the fact, if such was the fact, that plaintiff's car would be on the defendant's side of the road, and the defendant cannot be charged with negligence by reason of his failure to anticipate such fact, if such was the fact, in the absence of a showing that the defendant knew or by the exercise

<sup>76</sup> Stock Form of Judge Glenn C Gillespie, Pontiac, Michigan

<sup>77</sup> Plumb v Burnham, 151 Neb 129, 36 NW2d 612, in which the foregoing instruction was approved.

The words in brackets have been supplied

<sup>78</sup> Goebel v Vaught, 126 Or 332, 269 P 491

of due care and caution on his part should and would have known such to be the fact, if such was the fact, and have reasonable time and opportunity to act to avoid the collision.<sup>79</sup>

#### Washington

While the paramount duty of the driver of a motor vehicle is to keep a lookout ahead, and, while he may assume that drivers of vehicles following from the rear will observe the laws of the road, he can not entirely ignore such vehicles.<sup>80</sup>

#### Wisconsin

Every operator of an automobile has the right to assume and act upon the assumption that every person whom he meets on the street will exercise ordinary care and caution, according to the circumstances, to avoid injury, and that he will not expose himself to danger, negligently or recklessly, but will, as is his duty, exercise ordinary care to keep a careful lookout, to listen for approaching vehicles, to avoid a collision, and if he sees or hears a vehicle before it strikes him, or by the reasonable use of his senses could see or hear it in time to avoid the injury, that he will promptly, in the exercise of ordinary care, attempt to avoid the injury.<sup>81</sup>

### § 332. — Duty to anticipate dangers and foresee natural and probable consequences of acts or omissions.

#### Indiana

If you find, from a fair preponderance of all the evidence, and the rules of law I have given you, that the negligent acts complained of, in plaintiff's complaint, were the proximate cause of plaintiff's injuries, as charged in the complaint, and you also find that the injuries complained of are such, which, in the exercise of reasonable and ordinary care, might reasonably have been foreseen and provided against by the defendant, in operating his automobile, then your verdict must be for the plaintiff, if you also find the plaintiff was without fault. In order for the plaintiff to recover, it is not necessary that the precise injury, which actually occurred, could have been reasonably anticipated at the time the wrong complained of was committed, if the resulting injury was of such a general character as the defendant might reasonably have foreseen and provided against.<sup>82</sup>

<sup>79</sup> Whisnant v Holland, 206 Or 392, 292 P2d 1087 See also Peters v Johnson, 124 Or 237, 264 P 459

<sup>80</sup> Curtis v Perry, 171 Wash 542, 18 P2d 840 See also Shelley v Norman, 114 Wash 381, 195 P 243

<sup>81</sup> Becker v West Side Dye Works, 172 Wis 1, 177 NW 907 To same effect, see John v Pierce, 172 Wis 44, 178 NW 297

<sup>82</sup> Keim v Whiting, Circuit Court, Marion County, Indiana, No. 42341



**Washington**

You are instructed, as a matter of law, that one driving at night, outside cities and towns, in the absence of a red or other light to warn him to the contrary, can assume that the traveled portion of the road ahead of him is unobstructed and safe for travel. You are further instructed that the excessive speed of travel of such car, if any, does not in any way destroy such assumption nor does it eliminate the requirement of warning of the presence of an obstruction in such traveled portion of the road.<sup>83</sup>

**Wisconsin**

(1) Every traveler is under obligation to provide against such dangers to himself and others as, under the circumstances, he ought reasonably to foresee might probably arise.<sup>84</sup>

(2) An adult person is negligent when, without intending to do any wrong, he does such an act or omits to take such a precaution that, under the circumstances present, he ought reasonably to foresee that some injury or damage might probably result from his conduct. He is, in duty, bound to foresee all such natural consequences of his conduct as an ordinarily prudent and intelligent person would ordinarily foresee under the then present circumstances.<sup>85</sup>

**§ 333. Exclusion of insurance from consideration of jury.****California**

In the questions asked of you concerning your qualifications to sit as jurors in this case, some mention was made of the matter of insurance. I instruct you that you can not bring in a verdict against any insurance company; and I further instruct you that no insurance company is a party to this action. The question of insurance does not enter into this case, and the jury is instructed not to consider the same at all.<sup>86</sup>

**Connecticut**

I should say to you here, right at the outset, that you are not to consider, at all, the question of whether H. Z., the defendant, was insured. It has no bearing whatever and should have none in your consideration of this case. It is only the question of whether the negligence of the defendant was the

<sup>83</sup> *Bailey v. Carver*, 51 Wash2d 416, 319 P2d 821.

<sup>84</sup> *Brown v. Haertel*, Circuit Court, Marathon County, Wisconsin, see 210 Wis 345, 352, 244 NW 630, 633, 246 NW 691.

<sup>85</sup> *Lapsenberg v. Snapp*, Circuit Court, Lincoln County, Wisconsin, see 205 Wis 681, 238 NW 289.

<sup>86</sup> *Coursault v. Schwebel*, 118 Cal App 259, 5 P2d 77.

proximate cause of the injury and death of E O That is the issue And whether, of course, the plaintiff herself contributed to that accident by her negligence. So dismiss the question of whether he was insured absolutely from your minds, as it has no bearing whatever upon the issues you are called upon to try in this case <sup>87</sup>

#### Kentucky

Gentlemen of the jury, so much of the answer of the witness in which he said he got a letter from the insurance company, dismiss from your minds. We are not trying a case against the insurance company. Forget that such an answer was made. <sup>88</sup>

#### Michigan.

One of plaintiff's witnesses, in detailing a conversation with defendant, made some reference to what defendant said with reference to some insurance company, which testimony was denied by the defendant I do not recall exactly what this testimony was, as it was promptly stricken from the record and you were instructed that it was not for your consideration, but I want at this time to say to you that there is no insurance company a party to this suit There is no question of insurance in this case and you are not concerned with it There is no evidence of it in the case and you are not to consider or speculate or imagine that there may or may not be any insurance involved in this controversy, for there isn't any, and it would be a fatal mistake for you to allow yourselves to be influenced in any way by any subject of that sort brought in by the testimony of a witness. You will absolutely obliterate it from your minds in the consideration of the evidence This is a suit between ——— plaintiff, against ——— defendant, and you are to determine the liability or nonliability of the defendant in this case from the sworn testimony as to just what occurred at the time of the accident, and you should dismiss from your minds entirely what was said with reference to any insurance company. <sup>89</sup>

#### Oregon

At the request of counsel for defendant F, I instruct you that there is no evidence in this case that there is any insurance involved in this case and you must not discuss any question of insurance By discussing such subject or giving it any weight

<sup>87</sup> O'Connor v Zavaritis, 95 Conn 111, 110 A 878

<sup>88</sup> Consolidated Coach Corp v Saunders, 229 Ky 284, 17 SW2d 233

<sup>89</sup> Ward v De Young, 210 Mich

67, 177 NW 213, Urthoven v Snyder, 213 Mich 318, 182 NW 80, Reynolds v Knowles, 223 Mich 70, 193 NW 900

in your deliberation, you would be violating your oath and by so doing, you might do a great wrong to these defendants.<sup>90</sup>

### § 334. Excessive number of occupants in vehicle.

#### Washington

The fact that there were four people riding in the Dodge coupe is a circumstance you may take into consideration in determining whether or not defendant was negligent.<sup>91</sup>

### § 335. Proximate cause of injury generally.

#### Arizona

Now, the proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any new cause, produces an injury, and without which the injury would not have occurred.<sup>92</sup>

#### California.

(1) The negligence which creates a liability on the part of the defendant, or that which will defeat a cause of action on the part of the plaintiff, is the negligence only which proximately causes the accident or which contributes to the cause thereof.<sup>93</sup>

(2) The natural and probable consequences of a negligent act or omission are those which ought to have been foreseen or could reasonably have been anticipated.<sup>94</sup>

(3) If after considering all of the evidence, you find that the accident might have been caused in several different ways, and you further can not determine what was the proximate cause of the accident, then your verdict must be for the defendants.<sup>95</sup>

#### Florida.

To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by natural and unbroken sequence without intervening efficient cause, so that but for the negligence of the defendant the injury would not have occurred. It must not only be a cause, but it must be the

<sup>90</sup> *Storla v Spokane, Portland & Seattle Transp Co*, 136 Or 315, 297 P 367, reh den, 136 Or 315, 298 P 1065

<sup>91</sup> *Curtis v Perry*, 171 Wash 542, 18 P2d 840

<sup>92</sup> *Chapman v Salazar*, 40 Ariz 215, 11 P2d 613

<sup>93</sup> *Fleming v Flick*, 140 CalApp

14, 35 P2d 210 See also *Burk v Extrafine Bread Bakery*, 208 Cal 105, 280 P 522, *Wright v Salzberger & Sons*, 81 CalApp 690, 254 P 671

<sup>94</sup> *Queirolo v Pacific Gas & Elec Co*, 114 CalApp 610, 300 P 487

<sup>95</sup> *Sale v Illinois Elec Co.*, 114 CalApp 71, 299 P 561.

proximate cause, proximate cause and efficient cause, from which an injury follows in unbroken sequence without any intervening cause to breach the continuity <sup>96</sup>

#### Georgia

If, in a given case, the injuries complained of did not flow naturally and directly from the wrongful act or omission attributed to the defendant, or could not reasonably have been expected to result therefrom, or would not have resulted therefrom but for the interposition of some independent, unforeseen cause, the defendant's such antecedent wrongful act or omission would not be the proximate cause of the injury complained of. <sup>97</sup>

#### Idaho

The court instructs the jury that the burden of proof rests upon the plaintiff to establish by a preponderance of the evidence the particular act or acts of negligence upon which recovery is sought, and that such negligence was the proximate cause of the injury complained of. <sup>98</sup>

#### Indiana

(1) It is the law that in order for the plaintiff to recover it is not necessary that the precise injury to plaintiff's decedent ought reasonably to have been foreseen, it is sufficient that an injury of some kind to some person could reasonably have been expected to result from the conduct of the defendant. When it has been determined by an application of this principle that there has been a failure to use care by the party or parties, it is unimportant whether the particular injury which actually occurred, if you find that any did occur, could have been reasonably expected to happen in the particular manner in which it did occur. In such cases the law imposes liability for all injurious consequences which result directly and proximately from the negligence, whether they are, and regardless of whether they might or might not have been, reasonably foreseen. <sup>99</sup>

(2) The court instructs the jury that the proximate cause of an injury as the term is used in these instructions, in its legal signification, is a cause, which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred, but in order to warrant a finding that the negligence alleged is the

<sup>96</sup> *Baston v Shelton*, 152 Fla 879, 13 S2d 453

<sup>97</sup> *Cochran v Kendrick*, 43 GaApp 135, 158 SE 57

<sup>98</sup> *Rudolph v Wannamaker*, 41 Idaho 98, 238 P 296

<sup>99</sup> *United States Nat. Bank v Davis*, Superior Court, Lake County, Indiana, No 2573. See also *Gerow v Hawkins*, 99 IndApp 352, 192 NE 713

proximate cause of an injury complained of, it must appear from the evidence that the injury was the natural and probable consequence of the negligence <sup>1</sup>

#### Iowa

As you have heretofore been told, it is incumbent upon the plaintiff to show, as one of the elements of his case, that the reckless operation of his car, by the defendant, if there was such, was the proximate cause of the injuries and damage of which the plaintiff complains. By "proximate cause" is meant the direct, efficient, producing cause. It does not necessarily mean that the defendant's alleged recklessness, if there was such, must be the sole and only cause of the plaintiff's injuries, for recklessness may be the proximate cause of an injury and still not be the sole and only cause of such injury.

To be the proximate cause, however, it must appear that had it not been for the recklessness of the defendant, in the respect charged, if there was such, the injuries and damages to the plaintiff would not have occurred. <sup>2</sup>

#### Kentucky

Proximate cause is to be determined as a fact in view of the circumstances attending it. It is that cause which naturally leads to, and which might have been expected to have produced, the result. The connection of cause and effect must be established. And if a cause is remote and only furnished the condition or occasion of the injury, it is not the proximate cause thereof. The proximate cause is a cause which would probably, according to the experience of mankind, lead to the event which happened, and remote cause is a cause which would not, according to such experience, lead to such an event. There can be no recovery on account of negligence of another which was not the proximate cause of the injury complained of. <sup>3</sup>

#### Maryland

The jury are further instructed that the words "direct and proximate cause" as used above do not mean sole cause. <sup>4</sup>

#### Michigan

(1) The essential facts or elements for the plaintiff to establish by the proofs to make out his case, are first, that

<sup>1</sup> *Koplovitz v Jensen*, Superior Court, Lake County, Indiana, No 19928, see 197 Ind 475, 151 NE 390

<sup>2</sup> *Johnson v McVicker*, 216 Ia 654, 247 NW 488

<sup>3</sup> *Suter's Admr v Kentucky Power & Light Co*, 256 Ky 356, 76 SW

2d 29

<sup>4</sup> *Yellow Cab Co v Lacy*, 165 Md 588, 170 A 190. See also *Cumberland & Westernport Transit Co. v Metz*, 158 Md 424, 149 A 4, reorg den 158 Md 424, 149 A 565

the defendant, F H A, was guilty of negligence within the meaning of the law, and second, that such negligence of the defendant was the proximate cause of the accident and the resulting injuries to the plaintiff. I will say, in that connection, that by proximate cause we mean an act or an omission to act from which the accident was the natural consequence <sup>5</sup>

(2) Under the law, violation of the statute is negligence per se, that means negligence in and of itself, so that if you find the defendant violated the statute by driving faster than the legal rate of speed at the time of the accident, that amounts to finding that he was negligent. However, it is still for you to determine whether or not said negligence was the proximate cause of the injury alleged. In other words, if the defendant was found by you to be negligent, you would still have to determine whether said negligence was the proximate cause of the injury. In other words, some other negligence may have been or was the proximate cause of the injury.

I referred to the proximate cause, and in that connection, even though you may find negligence, you must determine that that negligence was the proximate cause of the injury. Proximate cause of injury [is that cause] which is a natural and continuous sequence influenced by no other cause and producing the event and without which the event would not have occurred. But in order to warrant a finding that negligence is the proximate cause of the injury, it must appear from the evidence that the injury was a natural and proper sequence of the negligence, and should have been foreseen as likely to occur by a person of ordinary prudence under like circumstances <sup>6</sup>

#### Minnesota

(1) By proximate cause we mean that which causes it directly or through a natural sequence of events and without the intervention of any other independent or efficient cause <sup>7</sup>

(2) If a person had no reasonable grounds to anticipate that a particular act would or might result in an injury to anyone, then, of course, the act would not be negligent at all; but if the act itself is negligent, then, the person guilty of it is equally liable for all its natural and probable consequences whether he

<sup>5</sup> Oliver v Ashworth, 239 Mich 53, 214 NW 85

<sup>6</sup> Cole v Austin, 321 Mich 548, 33 NW2d 78

There was no objection raised to the instruction given here

<sup>7</sup> Benson v Hoenig, 228 Minn 412, 37 NW2d 422

In the case cited, judgment on verdict for plaintiff was affirmed

The action was against a funeral director who, while leading a funeral procession, suddenly stopped his car causing some of the rear cars to collide, injuring a passenger in one of the cars

could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to another, then, he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequences, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences, the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.

If from all the evidence in these cases, you should find that the injuries sustained by J. were not the natural consequence of defendant's behavior, and further find that such injuries would not have resulted therefrom but for the interposition of new and independent causes, then, the behavior of defendants would not be a proximate cause and would not be actionable.

If, from all the evidence, you should find the evidence equally consistent with two hypotheses, that is, that the injury to J. was caused by the negligence of defendants or may have been caused by the sole negligence of Mrs. E. [J's mother], then, plaintiffs have failed to sustain their burden of proof, and your verdict will be for the defendants.

If from all the evidence in these cases, you should find that Mrs. E. was negligent, and her negligence was the sole, proximate cause of the injury sustained by J., your verdict must be for the defendants.

If you find that there was no negligence on the part of the defendant B. [driver of the truck], your verdict would be for the defendants. If you find that there was any negligence on the part of the defendant B., and you should further find that his negligence was not the proximate or direct cause of the accident, or that Mrs. E.'s negligence was an efficient and intervening cause of this accident, then, in that event, your verdict would be for the defendants.<sup>8</sup>

#### Missouri

Proximate cause is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause,

<sup>8</sup> *Eichten v. Central Minn. Co-op Power Assn. of Redwood County*, 224 Minn. 180, 28 NW2d 862.

The case cited was an action on behalf of a three-months-old child

for injuries sustained while riding in a car driven by its mother which collided with a truck at an intersection. Judgment on verdict for plaintiff was affirmed.

produces the injury, and without which the result would not have occurred.<sup>9</sup>

**Nebraska.**

The burden is upon the plaintiff to establish by a preponderance of the evidence, the nature and extent of his injuries and the amount of his loss all as proximately caused by negligence on the part of the defendant.

If the plaintiff has so established such proposition by a preponderance of the evidence, your verdict will be for the plaintiff, unless you find the plaintiff himself to have been negligent to an extent to defeat his recovery, as herein elsewhere stated. If the plaintiff has failed to establish such proposition by a preponderance of the evidence, your verdict will be for the defendant.<sup>10</sup>

**New Jersey.**

Proximate cause is the cause which sets all others in motion and unless the plaintiff has proved to your satisfaction, by a fair preponderance of the evidence, not only that the defendant was negligent but also that her negligence was a proximate cause of this accident the plaintiff can not recover and your verdict must be for the defendant no cause of action.<sup>11</sup>

**North Dakota**

You have been instructed that before the plaintiff can recover, she must prove by a fair preponderance of the evidence that the defendant's agent, or the driver of the car, was guilty of negligence and that such negligence was the proximate cause of the plaintiff's injuries. In this connection, however, I instruct you further that such negligence need not be the sole cause of the injury. It is sufficient if the defendant's negligence is an efficient cause, that but for which, the injury would not have resulted. The fact that more than one cause combines to produce an injury does not relieve defendant from liability because it was responsible for only one of them, it being sufficient that defendant's negligence, if you find such existed, from a fair preponderance of the evidence, is an efficient cause, that but for which the injury would not have resulted. However, it must appear that defendant was responsible for one of the causes which resulted in the injury.

By way of explanation, I further instruct you that although you may find that J. G. was negligent in the operation of his car

<sup>9</sup> Cable v Johnson (MoApp), 63 73 NW2d 376  
SW2d 433

<sup>10</sup> Fridley v. Brush, 161 Neb 318,

<sup>11</sup> Fair v Floyd, 75 F2d 920.



and that his negligent act concurred in and contributed to the injury, yet, if the defendant's negligent act complained of herein was also one of the efficient or proximate causes of the injury, your verdict should be for the plaintiff, even though there may be more than one proximate cause, and notwithstanding the fact that J. G.'s negligence, if any, contributed to the injury. The fact that J. G. may have been negligent, his negligence is not imputed to the plaintiff under the evidence in this case.

To be the proximate cause of an injury, the negligent act or omission must be one of the efficient causes producing the injury. It need not be the sole cause, nor the last or nearest cause, but it is sufficient if it occurs with some other cause acting at the same time, which, in combination with it, causes the injury.<sup>12</sup>

#### Ohio

(1) By the "proximate cause" of a result is meant that which, in a natural and continued sequence, produces or contributes to produce such result, and without which, it would not have happened. This definition of proximate cause contemplates that there may be more than one proximate cause of a result.<sup>13</sup>

(2) But if, on the other hand, assuming there was in one or more of these particulars some negligence on his part, then a second question must claim your attention, which may be expressed as follows: Was such negligence on his part, in any degree, a direct and proximate cause of the damage which resulted to the plaintiff? The damage is the result about which we are concerned in a matter of this character, and by "proximate cause of a result" is meant that which in a natural and continued sequence produces or contributes to produce such result and without which it would not have happened. The last expression, "without which it would not have happened"—the antecedent of the term "which" is the negligence you find chargeable to the defendant.

If, upon this proposition, in your examination of it, it leads you to the conclusion, even though there was negligence on the part of that driver, that such negligence was not the direct and proximate cause of the damage to the plaintiff, then again I say it will be your duty to return a verdict for the defendant.<sup>14</sup>

<sup>12</sup> Leonard v North Dakota Co-Operative Wool Marketing Assn, 72 ND 310, 6 NW2d 576, affirming verdict and judgment for plaintiff on condition plaintiff accept a remittitur damnum.

<sup>13</sup> Reed v Sweet, Common Pleas Court, Huron County, Ohio, No 14915

<sup>14</sup> Chambers v West Penn Forwarding Co, Common Pleas Court, Huron County, Ohio, No. 15524

**Oregon**

(1) By proximate cause is meant the thing that actually caused the injury. It need not be the only cause, but it must be one of them and such as might be reasonably foreseen as leading to the injury. A person may do a negligent act, but, unless that negligence directly causes injury, it is not the proximate cause and such person is not responsible.<sup>15</sup>

(2) The proximate cause of an injury is the probable or direct cause. It is the cause that sets in motion or operation another or other causes and thus produces the injury. It is the cause without which the injury would not have occurred.<sup>16</sup>

**South Carolina**

(1) What do we mean by direct and proximate cause? It simply means that the cause to which an injury as complained of may be directly attributed to the exclusion of any other intervening cause other than that which is alleged in the complaint to which it might be attributed. If one suffers an injury and says it was due directly and proximately to certain things, then the one who comes into court and seeks to recover for that wrong must show that the thing he alleges was wrong and that wrong was the direct and proximate cause of his injury.<sup>17</sup>

(2) Now, what is meant by proximate cause? The legal, technical definition is that which was directly and immediately effective in producing the injury complained of, and without which it would not have happened. Now, that is the technical term, Mr F and gentlemen of the jury, one a little bit hard to remember, but sometimes I give an illustration which, when I am through with it, helps you to better apply that principle. That which was directly and immediately effective in producing the injury complained of, and without which it would not have happened. Let's get at it this way. We say it is against the law to run a train over a certain place faster than 50 miles an hour, and it is against the law to drive that train beyond a crossing without blowing the whistle at a certain distance or ringing the bell at a certain distance. Then we will say that it is against the law to drive upon the highway which crosses that railroad at a greater rate of speed than 35 miles an hour, and also against the law to cross the crossing without first stopping, looking, and listening, and that it is against the law to travel upon the highway in a car not properly equipped with

<sup>15</sup> *Califf v Norman*, 210 Or 198, 310 P2d 319

<sup>16</sup> *Houston v Maunula*, 121 Or 552, 255 P 477

<sup>17</sup> *Parker v Simmons*, 163 SC 42, 161 SE 169

brakes and lights All right, now here comes the train down the railroad traveling at the rate of 75 miles an hour, it does not blow the whistle, nor does it ring the bell. Here comes a man in an automobile up the highway, traveling at 50 miles an hour, has no brakes on the car, and has no lights on the car. Now, the law says, if that train is traveling over 50 miles an hour, the driver is guilty of negligence per se, and the failure to ring the bell is negligence per se, and the failure to blow the whistle is negligence per se So, you see, the driver is guilty of negligence per se in three instances, and the driver of the car, in exceeding 35 miles an hour, and having no lights and no brakes, is guilty of negligence per se in three instances. The man in the automobile comes to the railroad track, he looks up the railroad track, and he apprehends the train coming, and in his excitement he does something that cuts off his motor, and he stops on the railroad track, or if, after seeing the train, he applies his brakes, and his brakes don't work, and he stops on the railroad track, and the engine comes along, and sky-rockets him away Now, you may say that the proximate cause of the accident was that he didn't have brakes on the car. Whether the train was going 75 miles an hour, or whether it failed to ring the bell or blow the whistle, if he saw the train, doesn't make any difference, as neither one of those was the proximate cause of the accident That which was directly and immediately effective in producing the injury complained of and without which it would not have happened—that is the proximate cause; that is what the law asks you to seek for in this case What was the direct and proximate cause of the injury inflicted upon this lady, if any? What was the thing directly and immediately effective in producing the injury complained of, and without which it would not have happened? Was it on her part, or was it on the children's part? If it was on the children's part, then she can recover If it was on her part, and not upon the children's part, then she can't recover. Now, they set out acts of negligence They say she was traveling at an excessive rate of speed. Go ahead and see if she was; if she was, see if that was the proximate cause of Mrs. D's injury Or, if she was guilty of any of these other acts of negligence alleged here, see if that was the proximate cause.

Take the illustration I gave you of the engineer driving a train and the driver of the automobile In circumstances like that, you might find the failure to blow the whistle or ring the bell or traveling at an excessive rate of speed was the proximate cause On the other hand, you might find that the man driving on the highway at an excessive rate of speed and not stopping to look and listen, and not having any brakes, were the proxi-

mate causes. You might find they are all proximate causes. In circumstances like that, you would leave them where you found them <sup>18</sup>

#### Texas

You are instructed that the term “proximate cause,” as that term is used in the following issues, means a moving and efficient cause, without which the injury in question would not have happened, an act or omission becomes a proximate cause of an injury whenever such injury is the natural and probable consequence of the act or omission in question and one that ought to have been foreseen by a person of ordinary care and prudence in the light of attending circumstances. It need not be the sole cause, but it must at least be a concurring cause, which contributed to the production of the result in question and but for which the said result would not have occurred.

The term “moving cause,” as used in the above definition, means that cause which is present and acting in bringing about the result.

The term “efficient cause,” as used in the above definition, means simply the working cause, or that cause which produced effects or results. <sup>19</sup>

#### Washington

You are further instructed that the proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which the event would not have occurred. <sup>20</sup>

#### Wisconsin

Negligence is a cause of a collision when it alone produces it or cooperates with some other cause in producing it jointly as a natural result.

There may be more than one cause of a collision. The negligence of one person alone may produce it or the negligence of two or more persons may jointly produce it. The fact that the collision occurred is not conclusive that it was caused by negligence of any person. It might be the result of an unavoidable accident resulting without any person being negligent.

<sup>18</sup> Daugherty v Williams, 144 SC 437, 142 SE 722

<sup>19</sup> Southland - Greyhound Lines, Inc v Cotten (TexCivApp), 55 SW 2d 1066, rev'd, 126 Tex 596, 91 SW 2d 326. See also Linn Motor Co v

Wilson (TexCivApp), 14 SW2d 867, Ineeda Laundry v Newton (TexCiv App), 33 SW2d 208

<sup>20</sup> Graves v Mickel, 176 Wash 329, 29 P2d 405. See also Simonson v Huff, 124 Wash 549, 215 P 49

It is for you to determine whether it was here the natural result of negligence, and if so, of whose negligence.<sup>21</sup>

**§ 336. — Concurrent causes of injury; joint and several liability.**

**Alabama**

When two or more people are engaged in a joint adventure, each is responsible for the torts committed by the other while acting directly in the business of the joint enterprise. If the jury are reasonably satisfied from the evidence that defendant D. and defendant W. were taking the \_\_\_\_\_ car to Tuscaloosa together for the C. M. Co., and that part of the time one was driving and part of the time the other was driving the car, and that both had equal control of the car, then the court charges the jury that it is open to the jury to find from the evidence that both W and D were engaged in a joint enterprise and each would be responsible for the driving of the car, whether the one or the other was actually at the wheel at the particular moment that the accident happened.<sup>22</sup>

**California**

(1) You are instructed that, under the evidence, there is no question of contributory negligence in this case, and if you find that the plaintiff, E B., was injured proximately by the happening of the accident, then you will find against at least one of the defendants. You will find against both of them if you find that the negligence that caused the accident was the concurrent, joint, and contemporaneous negligence of each defendant acting one with the other, but, whether you find against both defendants, you will have to find against one of them.<sup>23</sup>

(2) If you find that both parties were negligent, as alleged in plaintiff's complaint and that their negligence proximately contributed to any injury sustained by plaintiff, then you are not to compare their negligence or determine which was more negligent or which contributed most to the injury, since both would be then jointly and severally liable and the plaintiff may recover against either or both of them, provided, of course, she was free from contributory negligence; and in these circumstances, if you so find, it will be your duty in this case to render your verdict in favor of the plaintiff and against all of the defendants.<sup>24</sup>

<sup>21</sup> Gilbert v Popp, Circuit Court, Marathon County, Wisconsin, see 204 Wis 622, 235 NW 680, Simac v Darrow, Circuit Court, Vilas County, Wisconsin, see 206 Wis 668, 240 NW 148, 149

<sup>22</sup> Crescent Motor Co v Stone, 211 Ala 516, 101 S 49

<sup>23</sup> Bibby v Pacific Elec R Co, 58 CalApp 658, 209 P 387

<sup>24</sup> Dougherty v Ellingson, 97 Cal App 87, 275 P 456

(3) If you further believe from the evidence that plaintiffs or either of them sustained injury or injuries by reason of said collision and that such negligence, if any, on the part of said defendant or defendants proximately caused or contributed in any way to the injuries if any, of plaintiffs or either of them, and that the plaintiffs were free of contributory negligence, then your verdict must be in favor of either or both of the plaintiffs and against such defendant or defendants, or either of them, as the case may be. <sup>25</sup>

(4) It is not necessary to find both defendants guilty of negligence proximately contributing to the injury; as against K alone, it is necessary to find his negligence alone caused the injury, as against Mrs J alone, it is necessary to find the same as to her, but as against both, it is necessary to find that the joint and concurrent negligence of both proximately caused the injury <sup>26</sup>

#### Connecticut

Negligence, in order to render one liable, need not be the sole cause of an injury. Where two causes combine to produce injuries, one is not relieved from liability because he is responsible for only one of them. The negligence of two or more persons may concur, and each be liable. <sup>27</sup>

#### Indiana

(1) If any negligent act or omission of duty of the defendant proximately caused the injury complained of, as shown by the evidence, and if you further find from the evidence that the plaintiff used reasonable and ordinary care under all the circumstances of the case, and that he was injured, then the fact, if it be a fact, that other causes combined with such negligent act or omission of duty of the defendant to cause such injury would not be sufficient to defeat a recovery by the plaintiff in this action <sup>28</sup>

(2) Where an injury is caused by concurrent negligence of two parties, the injured person may recover from either or both, and neither can successfully interpose as a defense the fact that the concurrent negligence of the other contributed to the injury, and if you believe from the evidence in this case, that the drivers of both cars in question were negligent, and that

<sup>25</sup> Hayes v Emerson, 110 CalApp 470, 294 P 765

<sup>26</sup> Bleumel v Kroizy, 113 CalApp 585, 298 P 825

<sup>27</sup> Sullivan v Krivitsky, 100 Conn 508, 123 A 847 See also Chaenen v

Connecticut Co, 100 Conn 486, 123 A 829.

<sup>28</sup> Zehringer v Boswell, Circuit Court, Marion County, Indiana, No 37669

their negligence jointly resulted in the accident alleged in the complaint, and that the plaintiff thereby received injuries, then the plaintiff has a right to recover against either or both of said drivers, and the fact that the driver of the car in which plaintiff was riding may have been negligent and that such negligence contributed to said accident, such fact alone will not bar a recovery against the defendants herein.<sup>29</sup>

**Maryland.**

The jury are instructed that if they find from the evidence that the plaintiff was a passenger in the bus of the defendant, the C. & W. T. Co., and that she suffered the injuries mentioned in the evidence by reason of a collision between the bus in which she was riding and the truck of the defendant, the A. O. Co., and if the jury further find that the collision was due both to the negligence of the defendant, the C. & W. T. Co., its servants or agents, and to the negligence of the defendant, the A. O. Co., its servants or agents, then the verdict of the jury must be for the plaintiff as against both defendants, unless they shall find the injury complained of resulted from the want of ordinary care and prudence on the part of the plaintiff directly contributing to the injury.<sup>30</sup>

**Minnesota**

If you find that the plaintiff has established, by a fair preponderance of the evidence, that both K. M. and Mrs. R. were negligent, and that the negligence of each of them was a contributing proximate cause to the accident, then your verdict should be against both defendants. If you find that the plaintiff has established by the requisite degree of proof that Mrs. R. was negligent and her negligence was the sole direct cause of the accident, then your verdict should be against Mrs. R. alone and in favor of the other defendant. If, however, you find that the plaintiff has established by the requisite degree of proof that defendant K. M. was negligent and his negligence was the sole proximate cause of the accident, then your verdict should be against K. M. alone and in favor of Mrs. R.<sup>31</sup>

**Missouri.**

Where the negligent acts or omissions of two or more persons concur and contribute to cause an injury, all persons who so contribute to cause the injury are liable to the person injured.<sup>32</sup>

<sup>29</sup> *Kettles v Sofianos*, Superior Court, Lake County, Indiana, No 23520.

<sup>30</sup> *Cumberland & Westernport Transit Co v Metz*, 158 Md 424, 149 A 4, 565.

<sup>31</sup> *Kerzie v Rodine*, 216 Minn 44, 11 NW2d 771

<sup>32</sup> *Felts v Spesia* (MoApp), 61 SW2d 402 See also *Banker v Wells* (MoApp), 274 SW 939

**Montana**

(1) You are instructed that where a person or property is injured through negligence of two or more persons jointly, that each and all of the persons through whose negligence the injury or damage resulted are liable therefor.<sup>33</sup>

(2) You are instructed that where a person is damaged, either in person or property, by the joint negligence of two or more persons, he does not have to show that one was more, or less, negligent than the other, and it is no defense, on the part of either of the ones negligent, to show that one was more negligent than the other.<sup>34</sup>

(3) You are instructed that in this case the defendant, J K., and the defendant, M. A. & G. Co., have been charged with negligence by the plaintiff, and each of said defendants has appeared separately in answer to such charge of negligence. You are instructed that it is your duty to consider the issues of negligence therein as to each of such separate defendants in accordance with the instructions of the court and in the light of the preponderance of the evidence introduced herein; and that, in accordance with said instructions you may find in favor of one defendant and against plaintiff, and in favor of plaintiff and against the other defendant, or in favor of plaintiff and against both defendants, or in favor of both defendants and against plaintiff, depending upon how you determine the issues of negligence as defined in these instructions.<sup>35</sup>

**Nebraska**

You are instructed that if one suffers injuries as the proximate result of the negligence of two parties, acting independently of each other, and such injuries would not have occurred but for the negligence of each of such parties, it is no defense for one of the parties to show that the other party was negligent; and in this case, if you find from a preponderance of the evidence that the defendants, C N and W P, doing business under the firm and style name of N & P Co., and N. & P. Co., were negligent, and that the negligence of the defendant E W, and the defendants C N and W P, doing business under the firm and style name of N & P Co., and N & P Co., was the exclusive proximate cause of plaintiff's injuries and that such injuries to plaintiff would not have occurred except for the negligence

<sup>33</sup> Mellon v Kelly, 99 Mont 10, 41 P2d 49

<sup>35</sup> Mellon v Kelly, 99 Mont 10, 41 P2d 49

<sup>34</sup> Mellon v Kelly, 99 Mont 10, 41 P2d 49



of the defendant, E W., and the negligence of the defendants, C N and W. P., doing business under the firm and style name of N. & P. Co., and N & P Co., and you further find that the plaintiff's negligence was not a proximate cause of his injuries, then your verdict should be in favor of the plaintiff.<sup>36</sup>

#### Ohio

(1) If you find by a preponderance of the evidence in this case that the defendant, the C H T Co., and the driver of the automobile in which the plaintiff was riding were both negligent, then such acts of negligence would be concurrent, and if they proximately contributed to, that is, were the direct and proximate cause of, the injury to plaintiff that she complains of, then your verdict may be against the defendant, the C H. T Co alone; that is to the amount, of course, you find for plaintiff.<sup>37</sup>

(2) There is no dispute but what this plaintiff was in her automobile that morning with her mother driving down in the village or municipality of Creston, down here, and that while she was driving along the highway there was a collision between this gasoline truck and her automobile, and that as a result of that collision, she did receive some injuries. Now, there is no dispute so far. On top of that, the plaintiff has asserted that the collision between her car and this gasoline truck was due to the negligent operation of the gasoline truck, and that the gasoline truck was being operated by an employee of some joint adventurers, as we call them in law—by the two defendants, who were engaged in a joint adventure; their employee is claimed by the plaintiff to have been negligent in the operation of a gasoline truck, resulting in the collision.

Well, now, I will take up with you the first question that you will have to consider when you go to your jury room. The first question I want your foreman or presiding officer to present to you as a jury, is this question: has the plaintiff shown by a greater probability of the truth that these two defendants were engaged in a joint adventure. By "joint adventure," we mean a special combination of persons undertaking jointly, some specific adventure for profit without any actual partnership or corporate designation, an association of persons to carry on a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge. The relation of joint adventures obviously is created where two or more persons combine their money, property or time in the conduct of some particular line or trade or for some particular business deal,

<sup>36</sup> *Casari v Winchester*, 126 Neb 463, 253 NW 434

<sup>37</sup> *Cambridge Home Tel Co v Harrington*, 127 OhSt 1, 186 NE 611

agreeing to share jointly or in proportion to capital contributed in the profits and losses, assuming that the circumstances do not establish a technical partnership

In other words, in the first instance here, in order for this plaintiff to recover at your hands against these two defendants on a joint-adventure claim, there must be at greater probability of the truth that these defendants,—and when the rule of law says “persons,” corporations are treated as persons the same as private individuals are—where that is shown, if she has shown it by the evidence, to have been a joint adventure, then you will go to the next question. If, however, that has not been shown by the greater probability of the truth here, that this was a joint adventure, then, in this action in this county against both of these defendants here in this trial, she would not be entitled to recover, regardless of the other facts. Is that clear to you? I have indicated that as to this action, at this time, in this county, it is based upon the assertion by the plaintiff that the defendants are joint adventurers, as I have described them.

Now, as I say, if you get to this point in the lawsuit, as you will, and at that time you should come to the conclusion, that the defendants were not joint adventurers, and that has not been shown by the greater probability of the truth, then it would be your duty to return a verdict for the defendants, and there would be nothing further for you to do in this lawsuit. That is the first dispute I am submitting to you. If, however, upon that, you should come to the conclusion that there is a greater probability of the truth that there was a joint adventure proven here by this plaintiff, you would then go into consideration of the next issue, and from this point on, if you get to this point in your deliberations, you may thereafter consider both defendants as one person and one defendant, because they would not be distinguished insofar as this lawsuit would then and in that event be affected. Now, is that clear to you?

There is no dispute that if these defendants were joint adventurers, the man by the name of Y was in the employ of whoever was directing that truck at that time, for whatever purpose it was being used. So, I can say to you further that you need not worry yourself about the matter of the driver not being here on the question of liability of the defendants, if they are liable at all, as joint adventurers, assuming first, as I have said, that you must so find before you get to this point, that they were joint adventurers, then you may treat the defendants together and in the same manner as if they themselves were the driver of the gasoline truck.

If you arrive at this point, you then come to the second point. The second point is that the plaintiff asserts that this gasoline truck was driven in a negligent manner, and then the next question, if you get to this point, is for your foreman to say, "Our next question is, was this truck driven in a negligent manner?"<sup>38</sup>

#### South Dakota

On the other hand, if you find that the injury and death of plaintiff's husband was not due to the joint negligence of both of the defendants, by their servants or employees, but was due to the negligence of the driver of one of the cars, and not to the other, and that such driver failed to operate his car in a careful and prudent manner, or failed to exercise the care and skill in the driving or operation of the car which he was driving, which an ordinarily prudent man would have used or exercised under like circumstances, and that by reason of such negligence and failure to exercise ordinary care and skill in the management of his car, the plaintiff's husband was injured and died, and that the negligence and failure of such driver to use and exercise the care and skill of an ordinarily prudent man under like circumstances was the proximate cause of the injury and death of the plaintiff's husband, then your verdict should be for the plaintiff and against such defendant, only, and not as against the other defendant.<sup>39</sup>

#### Texas.

When two causes combine to produce an injury to a traveler upon the highway, both of which in their nature are proximate, liability attaches jointly and severally to the persons responsible for the causes.

Where concurrent negligence or nonobservance of the law by each operator, combined together directly results in an injury, each becomes liable for the whole even though one may have contributed in a greater degree to the injury.<sup>40</sup>

<sup>38</sup> *Bennett v Sinclair Ref Co*, 144 OhSt 139, 57 NE2d 776

In the case cited, judgment on verdict for the plaintiff was affirmed. One of the principal issues in the case was whether the defendants were properly joinable in the case, and therefore, whether the court had jurisdiction over the individual defendant, who was served with process in another county. If they were joint adventurers, they were

properly joinable, and the court had jurisdiction over the person of the nonresident defendant. It was held that the question of joint adventure was properly submitted to the jury, and that there was no prejudicial error in the charge of the court.

<sup>39</sup> *Chiles v Rohl*, 47 SD 580, 201 NW 154

<sup>40</sup> *Dixie Motor Coach Corp v Galvan* (TexCivApp), 56 SW2d 268

**Vermont**

Whenever the separate and independent acts or negligence of several persons, by concurrence, produce a single and indivisible injury which would not have occurred without such concurrence, each is responsible for the entire result. The act or neglect of each is a proximate and efficient cause, and when several proximate causes contribute to an injury, and each is an efficient cause, without the operation of which the injury would not have been caused, the result may be attributed to any or all of such causes. <sup>41</sup>

**Virginia**

When the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action. <sup>42</sup>

**Washington**

You are instructed that it is the law of this state that where the concurring and combined negligence of two or more persons results in an injury to a third person, the third person may recover from either or all of them. If, therefore, you find from the evidence that the proximate cause of the injury to plaintiff was made up of two elements, that is, the negligence of S, if any, in the construction and maintenance of his gate in the lane or road in question, and also the negligence of the defendant, and that the plaintiff himself was not guilty of contributory negligence, then the defendant is liable for the injuries to plaintiff exactly as if he were solely responsible for the proximate cause of such injuries. <sup>43</sup>

**Wisconsin**

There may be more than one proximate cause of an injury; that is to say, there may be a lack of ordinary care on the part of more than one person and such lack of ordinary care on the part of each efficiently and essentially contributes to produce the injury as a natural result and reasonably to be expected result and in such case all such negligent persons would be jointly and severally responsible. <sup>44</sup>

**§ 337. — Intervening efficient cause.****California**

Whoever does a wrongful act is answerable for all the conse-

<sup>41</sup> Hunter v Preston, 105 Vt 327, 166 A 17

<sup>42</sup> Norfolk & P B L R Co v Parker, 152 Va 484, 147 SE 461

<sup>43</sup> Emmerich v Gray, 183 Wash 600, 49 P2d 31

See also Comfort v Penner, 166 Wash 177, 6 P2d 604

<sup>44</sup> Ferge v Schuetz, Circuit Court, Marathon County, Wisconsin, see 195 Wis 662, 217 NW 656

quences that may ensue in the ordinary course of events, though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrong-doer, or was in reality only a condition on or through which the negligent act operated to induce the injurious result. <sup>45</sup>

#### Indiana

If you find from the evidence that the defendant, W. W., was negligent in the first instance, by failing to bring his automobile to a stop in Baring Avenue and before entering upon 151st Street, or otherwise, but that the injury complained of would not have resulted from such negligence, and that the negligent act of an independent, responsible and intervening agent was the direct and proximate cause of the injury complained of, the defendant, W., would not be liable and you should so find.

You are instructed that an efficient intervening agency is in law, an agency or instrument over which the defendant charged with negligence had no control and which was not put in motion by the alleged wrongful act or acts of the defendant. If the character of the intervening agent and the circumstances of the intervention are such as could not reasonably have been expected to occur in the ordinary course of nature and according to common experience, then such agent or agency which intervenes between the wrongful conduct of a defendant and an injury to the plaintiff will be treated as the sole and proximate cause, and the wrongful act of the defendant will be treated as a condition. <sup>46</sup>

#### Iowa.

If you find that defendant was negligent as alleged, and as a result of such negligence, the horse became frightened, and such fright of the horse continued down to the time of the runaway to such an extent that without such fright the runaway would not have occurred, and in whole or in part because of such fright the horse ran away and threw M H from the buggy, and injured her, the mere fact, if it be a fact, that some other cause, or the act, negligent or otherwise, of some other person, operated in conjunction with the negligence of the defendant to increase the fright of the horse, and to produce such runaway and injury, would not in itself excuse the defendant from liability. <sup>47</sup>

<sup>45</sup> Coppock v Pacific Gas & Elec Co, 137 CalApp 80, 30 P2d 549 2908

<sup>46</sup> Kaczka v Whitmore, Superior Court, Lake County, Indiana, No 149 NW 631

<sup>47</sup> Herdman v Zwart, 167 Ia 500,

**Kentucky.**

If the independent intervening cause is a responsible one and not immediately connected with the original one, then the producer of the original will not be responsible for the consequences of the independent one.<sup>48</sup>

**Texas.**

A new and independent cause is an intervening efficient force which breaks the causal connection between the original wrong and the injury. Such new force must be sufficient of itself to be the cause of the injury and be one but for which the injury would not have occurred. The term "new" refers to and means a cause incapable of being reasonably foreseen by the original wrong-doer by the use of ordinary care on his part, and the word "independent" refers to and means the absence of the relation of cause and effect between the new cause and the original wrongful act or omission, and, unless the intervening cause is thus both new and independent, sufficient of itself to stand as the cause of the injury, breaking the causal connection, the original wrong-doer is not relieved from legal responsibility for his negligence.<sup>49</sup>

**§ 338. Contributory negligence generally.<sup>50</sup>****California.**

(1) All persons must exercise ordinary care when their conduct may affect any other person, or when they may be affected by the conduct of any other person. It is as much the duty of a person to exercise ordinary care for his own safety and protection as it is his duty to exercise ordinary care with respect to the safety and protection of others. It was as much the duty of the plaintiff to exercise ordinary care for his own safety and protection as it was the duty of defendants, or either of them, to exercise such care with respect to the plaintiff's safety and protection.<sup>51</sup>

(2) It was the duty of plaintiff to exercise his faculties of sight and hearing to apprise himself of danger, if any, and to use ordinary care at all times in exercising his senses of sight and hearing To look in a careless manner or to listen in a careless manner is not to look or listen at all.<sup>52</sup>

<sup>48</sup> Consolidated Coach Corp v  
Saunders, 229 Ky 284, 17 SW2d 233

<sup>49</sup> Stedman Fruit Co v. Smith  
(TexCivApp), 28 SW2d 622.

<sup>50</sup> See also Chapter 58, Contribu-  
tory Negligence and Assumption of

Risk

<sup>51</sup> Warnke v Griffith Co, 133 Cal  
App 481, 24 P2d 583

<sup>52</sup> Warnke v Griffith Co, 133 Cal  
App 481, 24 P2d 583

(3) It is not contributory negligence to fail to look for danger where there is no reason to apprehend it <sup>53</sup>

(4) The defendant's claim of contributory negligence on the part of the deceased child presupposes the existence of negligence on the part of defendant <sup>54</sup>

#### Connecticut

In determining whether the requisite degree of care has been exercised in any given situation by the plaintiff or the defendant, the conduct of each must be judged in the light of all the surrounding circumstances, and of such knowledge as each has of the situation or would have had by the exercise of due care in the use of the senses. The test is the same for the plaintiff and defendant. Every person is required to use his senses and is charged with seeing and knowing the things that he or she ought to see or know in the exercise of their faculties as a reasonably prudent person. She was bound to make use of her senses so as to avoid a danger that threatened or that she might reasonably anticipate under all the circumstances <sup>55</sup>

#### Illinois

The court instructs the jury that when it said in these instructions that the plaintiff was required to exercise ordinary care for his own safety, it is meant that he was required to exercise that degree of care which an ordinarily prudent person situated as plaintiff was before and at the time of the accident would have exercised for his or her own safety. <sup>56</sup>

#### Indiana.

The court instructs you that the plaintiff in this action is chargeable with the use of reasonable care for his safety; and reasonable care is defined by law to be such care as an ordinary and prudent person would use under all of the circumstances of the case as disclosed by the evidence, and failure to use such care is negligence <sup>57</sup>

#### Iowa

By contributory negligence is meant such negligence or want of reasonable care on the part of the party injured as was a cooperating cause and directly instrumental in causing or bringing about her damages in question, and may con-

<sup>53</sup> *Pinello v Taylor*, 128 CalApp 508, 17 P2d 1039

<sup>54</sup> *Wiezorek v Ferris*, 176 Cal 353, 167 P 234

<sup>55</sup> *Murphy v Adams*, 99 Conn 632, 122 A 398

<sup>56</sup> *Pierson v Lyon & Healy*, 243

Ill 370, 90 NE 693

<sup>57</sup> *Billias v Benevegna*, Superior Court, Lake County, Indiana, No 543. See also *Beard v Ball*, 96 Ind App 156, 182 NE 102, *Livingston v Rice*, 96 IndApp 176, 184 NE 583

sist in her voluntarily exposing herself to danger, or, in failing to avoid danger when the danger was known to her, or, when by the exercise of reasonable care and prudence on her part she would have discovered the danger in time to have avoided it, and it follows from this that although the defendant may have been guilty of negligence at the time, yet, if the plaintiff through her own negligence contributed to her damage, plaintiff can not recover.<sup>58</sup>

#### Kentucky.

If you believe from the evidence that at the time the car of the deceased was approaching the truck, the deceased was driving on the left side of the highway, or did not have his car under reasonable control, or did not keep a lookout, or did not use ordinary care in the management and control of his car, and that by reason of any one or all of said acts, if any, the deceased contributed to his death to such an extent that but for his act or omission it would not have occurred, you will find for the defendant.<sup>59</sup>

#### Maryland

(1) If you believe that the plaintiff contributed to his own injury by any failure to exercise that degree of care and caution for his own safety which prudent persons ordinarily exercise under similar circumstances, then your verdict should be for the defendant.<sup>60</sup>

(2) If you find from the evidence that the plaintiff failed to exercise such care and prudence as a discreet person would have exercised under all the circumstances, then the plaintiff is not entitled to recover, even though the defendant was negligent, provided the defendant could not have avoided the plaintiff's negligence.<sup>61</sup>

#### Michigan

(1) Contributory negligence is the doing or omitting to do an act which an ordinarily prudent person would not have done, or would not have omitted to do, under like circumstances, the result of which contributed to his own injuries sustained.<sup>62</sup>

<sup>58</sup> *Rogers v Lagomarcino - Grupe Co.*, 215 Ia 1270, 248 NW 1

See also *Hoegh v See*, 215 Ia 733, 246 NW 787

<sup>59</sup> *Whitney Transfer Co v Smith's Admx.*, 256 Ky 844, 77 SW2d 440  
See also *R B Tyler Co v Curd*, 240 Ky 253, 42 SW2d 298.

<sup>60</sup> *Gordon v Chait*, 158 Md 202,

148 A 232 See also *Riley v Walker*, 140 Md 137, 117 A 237

<sup>61</sup> *American Exp Co v Terry*, 126 Md 254, 94 A 1026, AnnCas 1917C, 650

<sup>62</sup> *Rowland v Brown*, 237 Mich 570, 213 NW 90



(2) And yet, if the jury find that there was negligence on the part of the defendant in the manner in which he drove and operated his automobile, and that the plaintiff was injured, still the defendant is not liable if, by using ordinary care, the plaintiff might have avoided the automobile and the collision and the injury. If you find that on the occasion in question, the plaintiff did not use ordinary care, or was herself guilty of negligence, which negligence contributed to the injury, then plaintiff can not recover in this case. That, to entitle the plaintiff to recover damages for the injuries sustained by reason of the accident in question, she must show the injuries to have been attributable to the misconduct of the defendant, and under such circumstances as to exonerate herself from all negligence on her part <sup>63</sup>

#### Montana

The test as to contributory negligence on the part of plaintiff in such a case as this, is this question—did he, or did he not, in the circumstances, act as would an ordinarily prudent man? <sup>64</sup>

#### Ohio

You will hear the term “contributory negligence” used during this charge. Contributory negligence is an act or omission on the part of the plaintiff amounting to a want of ordinary care on his part and concurring and corroborating with the negligent act of the defendant as a proximate cause or occasion of the injuries complained of.

To constitute contributory negligence in law, there must be a want of ordinary care on the part of the plaintiff which had a direct connection between the want of ordinary care of the defendant and the resulting injuries. <sup>65</sup>

#### Oklahoma

The question is, has the care, diligence and skill demanded by the peculiar circumstances of the particular case been exercised? If so, there is no negligence, if not, there is negligence. The plaintiff was not negligent if he exercised reasonable care, he was negligent if he failed to do so. His conduct, like that of the defendant, is to be estimated by what a reasonable and prudent man would have done under the circumstances. <sup>66</sup>

<sup>63</sup> Bouma v Dubois, 169 Mich 422, 135 NW 322

<sup>64</sup> Fulton v Chouteau County Farmers Co, 98 Mont 48, 37 P2d 1025.

<sup>65</sup> Sweeney v Schneider, 73 Oh App 157, 53 NE2d 820

<sup>66</sup> Haskell v Kennedy, 151 Okl 12, 1 P2d 729

**Oregon**

(1) Now, gentlemen of the jury, the rights and the duties of drivers of automobiles and pedestrians upon the public highways of this state are equal and reciprocal. Each has the right to the reasonable use of the public highway, and it is the duty of each to use and exercise reasonable care to avoid colliding one with the other.<sup>67</sup>

(2) Now, gentlemen of the jury, one of the issues in this case for you to determine is whether the plaintiff was guilty of negligence in failing to keep a proper or any lookout for his own safety. Now, in this connection, you will determine from the evidence whether the plaintiff made or kept such a lookout for his own safety as would have been made or kept by an ordinarily prudent person. If you find from the evidence that he did keep such a lookout for cars traveling on and along the highway as would have been made or would have been kept by an ordinarily prudent person, then the plaintiff would not be guilty of negligence in this respect. But if you find that he failed to make or keep such a lookout as would have been made or kept by an ordinarily prudent person, then he would be guilty of negligence. And if you find that he was so guilty of negligence in this respect and that such negligence contributed proximately to the accident, then the plaintiff can not recover and your verdict must be in favor of the defendants.<sup>68</sup>

**Texas**

Contributory negligence is such an act or omission on the part of the plaintiff, or one claiming to be injured, amounting to a want of ordinary and proper care and prudence as, concurring or cooperating with some negligent act or omission, if any, of the defendant, is a proximate cause of the injury.<sup>69</sup>

**Washington**

(1) A person may be guilty of contributory negligence in one of two ways, the first is where he does something which an ordinarily prudent, careful person would not do under the same circumstances, the other way is where he fails to take such precaution for his own safety as an ordinarily prudent person would take under the same circumstances and conditions.<sup>70</sup>

(2) You are instructed that, if you find from the evidence that the plaintiff might have avoided the accident by adopting

<sup>67</sup> *Shabel v Barber*, 137 Or 88, 300 P 331

<sup>68</sup> *Shabel v Barber*, 137 Or 88, 300 P 331

<sup>69</sup> *Stedman Fruit Co v Smith* (TexCivApp), 28 SW2d 622

<sup>70</sup> *Danielson v Carstens Packing Co*, 121 Wash 645, 210 P 12. See

some course of action other than that pursued by him, he would not necessarily be guilty of contributory negligence in that respect, provided you find that he acted as an ordinarily careful and prudent person would have acted under like circumstances and conditions, and you further find that an ordinarily prudent man under the particular circumstances surrounding the plaintiff at the time would have been justified in adopting the course pursued by the plaintiff. The plaintiff's conduct in that regard is not necessarily to be judged by the facts as they now appear before you, but the plaintiff is entitled to have his acts and conduct considered in the light of the facts as they appeared to him at the time, and, if you find that an ordinarily careful and prudent man would have acted as the plaintiff acted with his (the plaintiff's) view of all the circumstances as they were at that time, you will be justified in finding that he was not guilty of contributory negligence.<sup>71</sup>

#### Wisconsin

The fifth question is this

Did the plaintiff, J. M., fail to use ordinary care for her own safety and thereby proximately contribute to produce her own injury?

Ordinary care on the part of J. M. means such care and caution as are usually exercised for their own safety by the great mass or majority of travelers in automobiles under the same or similar circumstances.

In case the jury becomes satisfied by the evidence to a reasonable certainty that J. M., in riding in M.'s automobile in the manner in which she did at the time and place of this collision, and under all the circumstances then known to her and without doing anything more than she did to insure her safety, failed to use ordinary care for her own safety, and thereby efficiently contributed to produce her injuries as a natural result, and that under all the circumstances she ought reasonably to have expected that some injury might probably happen to her by reason of her conduct, then you should answer this question "Yes", otherwise you should answer it "No."<sup>72</sup>

#### § 338A. — Operator holding part of body outside vehicle.

The court instructs the jury that it is the duty of the driver of an automobile at all times to drive the same with the highest

also *De Lys v. Powell-Sanders Co.*, 90 Wash 31, 155 P 407, *Locke v. Greene*, 100 Wash 397, 171 P 245.

<sup>71</sup> *Lloyd v. Calhoun*, 78 Wash 438, 139 P 231.

<sup>72</sup> *Mitchell v. Raymond*, Circuit Court, Lincoln County, Wisconsin, see 181 Wis 591, 195 NW 855, *Heuvel v. Schultz*, 182 Wis 612, 197 NW 186.

degree of care, that is, that degree of care which a very careful and prudent person would exercise under the same or similar circumstances.

You are further instructed that if at the time of the collision mentioned in the evidence the plaintiff was driving his vehicle with his left arm or elbow hanging out of the window, if you so find, and if you further find that plaintiff by the exercise of the highest degree of care saw or should have seen the danger of collision in time to have gotten his arm into the automobile and out of danger, if you so find, and if you further find that plaintiff's failure to move his arm, if he did so fail, caused or contributed to cause his injury, and was negligence, then your verdict must be for the defendants. <sup>73</sup>

**§ 339. — Reliance on care of person causing injury.**

**California**

Every person has a right to assume that every other person will obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could be occasioned only through the violation of law or duty by another. However, such person must himself exercise due care on his part. <sup>74</sup>

**Kentucky**

In the absence of contrary knowledge, actual or implied, one need not anticipate danger which can come to him only through a breach of duty by another; that is, one may assume that all precautions required of others for his protection have been or will be taken, whether those precautions arise out of the common-law duty to exercise ordinary care to avoid injury to others, or by force of statute or ordinance. <sup>75</sup>

**Missouri**

The court instructs the jury that the plaintiff had a right to presume that no automobile would be run or driven upon a public street or highway, much used for travel, at a rate of speed that would be dangerous to people who may be crossing said street or highway at any usual or customary place for pedestrians to be crossing said public street or highway. <sup>76</sup>

<sup>73</sup> Martin v Turner, (Mo), 306 SW2d 473

<sup>74</sup> Webster v Harris, 119 CalApp 46, 6 P2d 88. See also Judd v Webster, 50 CalApp 743, 195 P 929, Wixon v Raisch Imp Co., 91 Cal App 129, 266 P 964, Forrest v. Pick-

wick Stages System, 101 CalApp 426, 281 P 723

<sup>75</sup> Foreman v Western Union Tel. Co., 228 Ky 300, 14 SW2d 1079

<sup>76</sup> Cool v Petersen, 189 MoApp 717, 175 SW 244

§ 340. — Presumptions and burden of proof as to contributory negligence.

California

(1) I instruct you that in this state contributory negligence is a defense, the burden of proving which rests upon the defendant and it is not incumbent upon the plaintiffs to establish affirmatively that they were free from negligence.<sup>77</sup>

(2) You are instructed that the burden of establishing the defense of contributory negligence by a preponderance of the evidence is upon the defendant, unless the same is proved or can be inferred from the evidence of the plaintiffs.<sup>78</sup>

(3) The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence.<sup>79</sup>

(4) Where the evidence is as consistent with a neglect of duty or care on the part of the injured person as it is with a neglect of duty or care on the part of the person charged with causing the injury, the injured party can not recover in an action for damages for the injuries sustained.<sup>80</sup>

(5) I instruct you that there is a legal presumption that the deceased, L. W., was obeying the law at the time and place of the accident in question and that he was exercising ordinary care for his own concerns at the time and place of said accident. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence. This presumption is disputable, but unless it is adequately and sufficiently controverted, you, the jury, are bound to find in accordance with the presumption that the deceased, L. W., was obeying the law and was exercising ordinary care for his own concerns and was not negligent at the time and place of the accident. It is evidence in the case and is sufficient in and of itself to support a verdict or finding on your part that the said deceased was careful at the time and place of the accident in question.<sup>81</sup>

<sup>77</sup> Daniel v Asbill, 97 CalApp 731, 276 P 149. See also Forrest v Pickwick Stages System, 101 Cal App 426, 281 P 723.

<sup>78</sup> Harrison v Harter, 129 CalApp 22, 18 P2d 436.

<sup>79</sup> Olsen v Standard Oil Co., 188 Cal 20, 204 P 393.

<sup>80</sup> Sheldon v James, 175 Cal 474, 166 P 8.

<sup>81</sup> Gighotti v Nunes, 45 Cal2d 85, 286 P2d 809.

(6) If a person dies as the result of an automobile accident and is, therefore, unable to testify concerning the circumstances surrounding the accident, then the law provides that the deceased person is entitled to the benefit of the presumption that he was using due care for his own protection and safety and that he was obeying the law at the time of the accident. The presumption in this case is that at the time of this accident the deceased, W. N., was not on the road without lights or reflectors at a time when lights or reflectors were required, and that he was obeying the law in every respect. These presumptions are a form of evidence and they will, in and of themselves, justify a finding that the deceased, W. N., was not guilty of contributory negligence, unless the presumptions have been overcome by satisfactory evidence to the contrary. You should consider these presumptions together with any other evidence bearing upon whether or not the deceased, W. N., was guilty of contributory negligence.<sup>82</sup>

**Connecticut.**

The other important thing which the plaintiff must establish is that his intestate at the time was in the exercise of due care, for the law is so that, no matter how negligent the defendant may have been, if the plaintiff's intestate himself was negligent, thus materially contributing and concurring in bringing about this accident which resulted in his death, then the plaintiff can not recover. So that, gentlemen, perhaps the first inquiry that you will enter upon when you go to your jury room will be this question, "Was the plaintiff's intestate himself in the exercise of due care at the time of this accident?" And if you should reach the conclusion that the plaintiff's intestate was not in the exercise of due care at that time, and that this accident either resulted from his own failure to observe due care, or resulted from the concurring act of the defendant and the intestate, then that would end the case, and you would not have to consider the further elements in this transaction.<sup>83</sup>

**Idaho.**

(1) The burden of proving the affirmative defense, set out in the answer of the defendants, is upon them and you should require the defendants to establish, by a fair preponderance of the evidence, such allegations, unless it appears from the evidence introduced by plaintiffs.<sup>84</sup>

<sup>82</sup> Norton v Futrell, 149 CalApp 2d 586, 308 P2d 887

<sup>83</sup> Lukosevicia v Bartow, 99 Conn 723, 122 A 709. See also Brown v New Haven Taxicab Co., 93 Conn

251, 105 A 706, Eukers v Summer, 110 Conn 230, 147 A 671

<sup>84</sup> French v. Tebben, 53 Idaho 701, 27 P2d 474

(2) There is, until the contrary is proved, a presumption that the deceased, W. E. P., was exercising due and proper care for the protection of his person and the preservation of his life at the time of the accident; this presumption arises from the instinct of self-preservation and the disposition of men to avoid personal harm. This presumption is not conclusive, but is a matter to be considered by the jury, in connection with all the other facts and circumstances of the case, in determining whether or not the deceased, W. E. P., was guilty of contributory negligence at the time of the accident.<sup>85</sup>

#### Illinois

(1) Before the plaintiff can recover in this case, he must show and prove by a preponderance of the evidence that the collision between the cars was caused by the carelessness, or negligence, of the defendant, C., and that he, plaintiff, at and just before the time of the accident, was using and exercising due care and caution for his own safety and the safety of the car that he was driving; and if the plaintiff has failed to prove or establish either of these elements or propositions by a preponderance of the evidence, then the plaintiff can not recover, and your verdict should be for the defendant, and you should find him not guilty.<sup>86</sup>

(2) The jury are instructed that even though they find from the evidence that the defendant was or that its servant was guilty of negligence which contributed to the injury in question, yet if they also believe from the evidence that the plaintiff could have avoided the injuries to herself by the exercise of ordinary care on her part, and that she did not exercise such care, then she can not recover in this case, and on this question of care for her own safety, the burden of proof is upon the plaintiff.<sup>87</sup>

#### Indiana.

The court instructs the jury that the burden of showing contributory negligence, if any, on the part of the plaintiff rests on the defendants, and that defendants must do so by a fair preponderance of the evidence.<sup>88</sup>

<sup>85</sup> Packard v O'Neil, 45 Idaho 427, 262 P 881, 56 ALR 317

<sup>86</sup> Gordon v Current, 263 IllApp 435

<sup>87</sup> Kehr v Snow & Palmer Co, 225 IllApp 403

<sup>88</sup> Kansas v Dubois, Superior Court, Lake County, Indiana, No 23172. See also Bodner v. LaFleur,

87 IndApp 291, 161 NE 696

As to personal injuries, the burden of proof concerning contributory negligence is on the defendant Cleveland, C, C & St L R Co v Wischart, 161 Ind 208, 67 NE 993, Indiana Nitroglycerine & Torpedo Co v Lippincott Glass Co, 165 Ind 361, 75 NE 649, Ft. Wayne, V. W.

**Iowa.**

(1) In order to recover, it is essential that the plaintiff prove, by a preponderance or the greater weight of the evidence that she was not herself guilty of contributory negligence in any manner or degree proximately contributing to such injury and collision.<sup>89</sup>

(2) Where there are no eye-witnesses as to the manner in which he was conducting himself at the time he received the injuries, the law presumes that he was exercising such care and caution as men of ordinary prudence, judgment and discretion exercise under like circumstances, and in relation to the same matters unless the facts and circumstances shown upon the trial negate such presumption.<sup>90</sup>

**Massachusetts**

There is a presumption that every person is in the exercise of due care. When evidence is introduced, then the presumption fades away and the actual evidence will control. While Mr. B. is presumed to have been in the exercise of due care, when the evidence comes in as to what he was doing, whether he was doing what a reasonably prudent person would do in crossing a thoroughfare which is traveled to the extent which this is, then it is for you to say, bearing in mind, of course, all the time the presumption whether those facts show that he was not in the exercise of due care, and if he was not in the exercise of due care in whatever he did, then he can not recover. And if he was in the slightest degree careless, negligent, no matter what his injuries may have been, no matter how negligent the person who struck or hit him or did other injury to him may have been, he can not recover. But the burden of showing that he

& L Trac Co v Monroeville Home Tel Co, 179 Ind 334, 100 NE 69, Evansville & S I Trac Co v Williams, 183 Ind 633, 109 NE 963, Pittsburgh, C, C & St L R Co v Dove, 184 Ind 447, 111 NE 609, Standard Brewery v Musulin, 189 Ind 231, 125 NE 70, Keltner v Patton, 204 Ind 550, 185 NE 270, Potter v Ft Wayne & W. V Trac Co, 43 IndApp 427, 87 NE 694, Cleveland, C, C & St L R Co v Moore, 45 IndApp 58, 90 NE 93, Rhea v Sawyer, 54 IndApp 512, 102 NE 52, Ackerman v Pere Marquette R Co, 58 IndApp 212, 108 NE 144, Julius Keller Constr Co v Heikless, 59 IndApp 472, 109 NE

797, Indianapolis & C Trac Co v Sherry, 65 IndApp 1, 116 NE 594

As a damage to property, the burden of proof concerning contributory negligence is on the plaintiff Fort Wayne, V W & L Trac Co v Monroeville Home Tel Co, 179 Ind 334, 100 NE 69, Rhea v Sawyer, 54 IndApp 512, 102 NE 52, Julius Keller Constr Co v Heikless, 59 IndApp 472, 109 NE 797, Indianapolis & C Trac Co v Sherry, 65 IndApp 1, 116 NE 594

<sup>89</sup> Stilson v Ellis, 208 Ia 1157, 225 NW 346

<sup>90</sup> Lorimer v Hutchinson Ice Cream Co, 216 Ia 384, 249 NW 220



was not in the exercise of due care rests upon the defendant, whereas, the burden of showing negligence on the part of the defendant rests upon and is with the plaintiff.<sup>91</sup>

#### Michigan

Before the plaintiff can recover in this suit he must show that he himself was free from contributory negligence.<sup>92</sup>

#### Minnesota

If you find there was negligence on the part of the defendant in the operation of his car, then take up the next question, which is contributory negligence. Was the deceased guilty of contributory negligence? With reference to this, the burden of proof rests upon the defendant, and the defendant must prove it by a fair preponderance of the evidence. It is not presumed on the part of the deceased. As a matter of fact, the presumption is rather the other way, because the burden of proof is upon the defendant to establish by a fair preponderance of the evidence that the deceased was guilty of contributory negligence in order to constitute a defense in this lawsuit.<sup>93</sup>

#### Missouri

(1) The court instructs the jury that the defendant in its answer among other defenses pleads that contributory negligence on the part of the plaintiff contributed to her injury; upon this issue you are instructed that the burden of proof is upon the defendant, and it devolves upon the defendant to prove such contributory negligence of the plaintiff by a preponderance of the evidence to the satisfaction of the jury, before you are warranted in finding for the defendant on that issue, unless the evidence offered by plaintiff shows that she was guilty of contributory negligence.<sup>94</sup>

(2) One of the defenses interposed in this case is the contributory negligence of deceased. This is an affirmative defense and the defendant must prove such negligence of deceased by the greater weight or preponderance of the evidence in the case, before the jury can find against the plaintiff on that defense.<sup>95</sup>

#### Nebraska

Negligence is not presumed but must be proved. The defendant, having alleged that the accident was proximately caused by

<sup>91</sup> Brown v Henderson, 285 Mass 192, 189 NE 41

<sup>92</sup> Reynolds v Knowles, 223 Mich 70, 193 NW 900. See also Anderson v Lynch, 232 Mich 276, 205 NW 134, Rowland v Brown, 237 Mich 570, 213 NW 90

<sup>93</sup> Loverage v Carmichael, 164

Minn 76, 204 NW 921. See also Boyer v Josephson, 185 Minn 221, 240 NW 538

<sup>94</sup> Jackson v Malden (MoApp), 72 SW2d 850

<sup>95</sup> Robertson v Scoggins (Mo App), 73 SW2d 430

negligence on the part of the plaintiff or his contributory negligence, places burden upon himself to establish any such negligence or contributory negligence and that the same was the proximate cause of or proximately a contributing cause to the accident.<sup>96</sup>

#### North Carolina

The burden of proof upon the second issue is upon defendants to satisfy you from the evidence, and by its greater weight, that plaintiff himself was negligent, and that his negligence was a proximate contributing cause to his injury. That is what we term "contributory negligence." "Contributory negligence" means want of due care upon the part of a person who has been injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof and without which it would not have occurred.<sup>97</sup>

#### North Dakota

Upon the question of contributory negligence, the burden of proof lies upon the defendants and the same burden of proof lies upon the plaintiffs in the first instance to prove their right to recover. In other words, if you find that the defendants were negligent, and you find that the plaintiffs were negligent, or one of the plaintiffs contributed to the accident and was not entitled to recover, the defendants must prove that fact as to the contributory negligence by a fair preponderance of the evidence. And so, if upon that question you find that the evidence is so evenly balanced that you can not say in which direction it leads you, where the greater weight of the evidence is, then and in that case, you should find in favor of the plaintiffs without finding that the plaintiffs were guilty of contributory negligence.<sup>98</sup>

#### Ohio

The defendant, in a special defense, pleads that if plaintiff received any injuries in said collision, her own negligence contributed to produce them. This plea raises the question of contributory negligence on the part of the plaintiff, provided she received any injury in the collision. The burden is on the plaintiff to prove by a preponderance of the evidence that she was injured in said collision, in one or more of the particulars set forth in her petition. If she has so shown that she was so

<sup>96</sup> *Fridley v Brush*, 161 Neb 318, 427  
73 NW2d 376

<sup>97</sup> *Alexander v Southern Public Utilities Co*, 207 NC 438, 177 SE  
<sup>98</sup> *Billingsley v McCormick Transfer Co*, 58 ND 921, 228 NW 427

injured, then, on the question whether she, by her own negligence, directly contributed to produce her said injuries, the burden is on the defendant to prove by a preponderance of the evidence that some act of negligence of the plaintiff did contribute to produce the collision.<sup>99</sup>

#### Pennsylvania

The burden rests upon the defendant to establish contributory negligence on the part of Mr H. [plaintiff's decedent]. When you come to decide whether there was or was not contributory negligence on the part of the decedent, you take into consideration all the evidence in the case, both that given on the part of the plaintiff and that which was given on the part of the defendant and on all of the testimony in this case, you will decide whether or not Mr H was contributorily negligent. When you weigh that evidence you must keep in mind too that the burden is on the defendant to persuade you by the fair weight of the evidence that Mr. H was contributorily negligent. If they fail in that burden, then, of course, the right of the plaintiff to recover is not lost because of contributory negligence. It can only be in the event that the defendant met the burden cast upon him to persuade you by the fair weight of the evidence that Mr H was contributorily negligent that you would decide this case in favor of the defendant on that ground of contributory negligence.<sup>1</sup>

#### Utah

Contributory negligence may appear from the plaintiff's evidence, and, if it does so appear by a preponderance of the evidence, the plaintiff may not recover.<sup>2</sup>

#### Vermont

Plaintiff has the burden of showing that the intestate was free from contributory negligence; but this does not require evidence distinctly directed to that negative proposition. Any evidence that tends to show that H.'s death was due solely to the defendant's negligence tends to show freedom from negligence on the part of H. It is a question to be inferred from the attending circumstances.<sup>3</sup>

<sup>99</sup> Kress v Roush (OhApp), 198 NE 491. See also Houston v Schriber, 34 OhApp 244, 170 NE 661.

<sup>1</sup> Hepler v Hammond, 363 Pa 355, 69 A2d 95, affirming verdict for plaintiff in action for wrongful death. The court held the foregoing instruction to be correct, in view of

the fact that the evidence in plaintiff's case did not show contributory negligence.

<sup>2</sup> Morgan v Bingham Stage Lines Co., 75 Utah 87, 283 P 160.

<sup>3</sup> Higgins v Metzger, 101 Vt 285, 143 A 394.

**Washington**

You are further instructed that the defendants have set up the defense of contributory negligence, and it will devolve upon them to prove the same, if they are to prevail thereunder, by a preponderance of the evidence, as that term has been hereinbefore defined. A person is guilty of contributory negligence when he does something which an ordinarily careful person would not do under the circumstances and conditions of a given case, or when he fails to take such precautions for his own safety as an ordinarily prudent person would take under the same circumstances and conditions. And it makes no difference in this connection whether you find the defendants were guilty of negligence as charged in the complaint, if you find the plaintiff was also guilty of negligence. Therefore, if you should be satisfied by a preponderance of the evidence that the injury to the plaintiff, J. J., if any, was caused through the negligence of the defendant's chauffeur, as set forth in the complaint, but that the plaintiff, J. J., failed to use such care as a sensible, prudent person would have used under like circumstances, and that plaintiff failed to take such precaution for his own safety as an ordinarily prudent person would have taken under like or similar circumstances, and that his negligence and carelessness in failing to take such reasonable precautions for his own safety was the proximate cause of, and contributed to, such injury, and was thus guilty of contributory negligence on his part, notwithstanding the negligence of the defendants, if any is shown, that would be a defense, and your verdict must be for the defendants.<sup>4</sup>

**§ 341. — Effect of contributory negligence generally; contributory negligence as proximate cause of injury.**

**Federal****District of Columbia**

The court instructs the jury that even if you find from the evidence that the defendant's driver was, at the time and place in question, guilty of the negligence charged in plaintiff's declaration, yet, if you further find from the evidence and under the instructions of the court that the plaintiff, B. M. M., was also negligent, and that her negligence, if any, caused or proximately contributed to cause the accident, then the plaintiffs can not recover in this case. And the court further instructs you that under such circumstances you are not warranted in comparing

<sup>4</sup> Johnson v Bloedel, 102 Wash 293, 172 P 1171. See also Stanhope v Strang, 140 Wash 693, 250 P 351.

the negligence, if any, of the plaintiff, B. M. M., and the defendant's driver to determine which was guilty of the greater degree of negligence, but if you find from the evidence and under the instructions of the court that the plaintiff, B. M. M., was guilty of any want of ordinary care which caused or proximately contributed to cause the accident in question, then you shall find the defendant not guilty.<sup>5</sup>

#### New Jersey

If the plaintiff herself was guilty of any negligence which contributed in the slightest degree to the happening of the accident, she can not recover.<sup>6</sup>

#### Oklahoma.

The jury is instructed that if it appears from the evidence that the plaintiff and defendant were both negligent and that the negligence of both directly contributed to the cause of the accident, then your verdict should be for the defendant.<sup>7</sup>

#### Alabama

I charge you, gentlemen of the jury, that if you believe from the evidence in this case that the plaintiff's injuries were proximately caused by her own negligence or that her own negligence contributed to her injuries, then you must find for the defendant.<sup>8</sup>

#### California

(1) In order for the defendants to avail themselves of the defense of contributory negligence, they must prove that such negligence on the part of the plaintiff was the proximate cause or contributed to the proximate cause of said accident. To sustain such a defense of contributory negligence, it must be shown to have had some causal connection with the accident, or that it cooperates with the negligent act of the defendant, if any, in being the proximate cause of the injury.<sup>9</sup>

(2) Any negligence of the plaintiff which had nothing to do with the cause of the accident, or that which was so remote and inconsequential that it does not affect the transaction in any manner whatever, will not debar him from recovering damages for the negligence of a defendant.<sup>10</sup>

<sup>5</sup> American Ice Co v Moorehead, 66 AppDC 266, 66 F2d 792. See also *Chr Heinrich Brew Co v McGavin*, 56 AppDC 387, 16 F2d 334.

<sup>6</sup> Fair v Floyd, 75 F2d 920.

<sup>7</sup> Shell Pipe Line Co v Robinson, 66 F2d 861.

<sup>8</sup> Kelly v Hanwick, 228 Ala 336,

153 S 269. See also *Brown v Woolvorton*, 219 Ala 112, 121 S 404, 64 ALR 640, *Smith v Crenshaw*, 220 Ala 510, 126 S 127.

<sup>9</sup> Fleming v Flick, 140 CalApp 14, 35 P2d 210.

<sup>10</sup> Fleming v Flick, 140 CalApp 14, 35 P2d 210.

(3) If the negligence of the plaintiff was only remotely connected with the injury, the plaintiff may recover damages, if, notwithstanding such remote negligence of the plaintiff, the defendant might have avoided the injury by the exercise of ordinary care. But if a want of ordinary care on the part of the person injured concurs as a proximate cause in producing the injury, the defendant is not liable, although in fault.<sup>11</sup>

(4) There are no degrees of negligence or contributory negligence in this case. In other words, if you find that the plaintiff was guilty of any contributory negligence, however slight, which proximately contributed to cause the injury and damage complained of, you are not to weigh and balance such contributory negligence against any negligence on the part of the defendant, J. C., but it is your duty, if you find that there was any contributory negligence on the part of the plaintiff which proximately caused her injuries, to return your verdict in favor of the defendants.<sup>12</sup>

#### Florida

I charge you, at the request of the defendant, that if you find from the evidence that both the driver of the defendant's truck and the plaintiff were guilty of negligence, and that the negligence of each helped to produce or bring about the accident, then the plaintiff can not recover, where both parties to a collision are guilty of negligence, and the negligence of each helps to bring about the collision, then the law leaves them where it finds them, under such circumstances neither is entitled to recover from the other.<sup>13</sup>

#### Georgia

(1) A duty rested upon the plaintiff to avoid the consequences of the defendant's negligence, if plaintiff knew of the negligence, or by the exercise of ordinary care could have discovered it.<sup>14</sup>

(2) If the plaintiff, by the exercise of ordinary care, could have avoided the effect of the negligence of the defendant, in case the defendant was negligent, after the plaintiff discovered the defendant's negligence or in the exercise of ordinary care and diligence, could have discovered the same, then the plaintiff could not recover, even though the defendant was negligent.<sup>15</sup>

<sup>11</sup> Fleming v Flick, 140 CalApp 14, 35 P2d 210

<sup>12</sup> Creamer v Cerrato, 1 CalApp 2d 441, 36 P2d 1094

<sup>13</sup> Baston v Shelton, 152 Fla 879, 13 S2d 453.

<sup>14</sup> Smeltzer v Atlanta Coach Co., 49 GaApp 755, 176 SE 846

<sup>15</sup> Kinney v Turnpseed, 45 Ga App 269, 164 SE 225

**Indiana**

If you find that the defendant was negligent as alleged in the complaint and you also find that the plaintiff himself failed to exercise ordinary care to avoid the collision, and that his failure, if any, contributed proximately in the slightest degree to the cause of the collision, then, under those circumstances the plaintiff is not entitled to recover.<sup>16</sup>

**Kentucky**

Even though you may believe from the evidence that the defendants were guilty of negligence, under instruction No. 1, yet, if you further believe from the evidence that the plaintiff was also guilty of negligence, and that his negligence, if any, so contributed to his injury that, but for it, the injury would not have occurred, you should find for the defendants.<sup>17</sup>

**Maryland**

If the jury find that at the time and place mentioned in the evidence, the defendant herein was operating his car in careful fashion, and that W B W by his own negligence received the injuries which resulted in the death of the said W B. W., then the verdict of the jury shall be for the defendant.<sup>18</sup>

**Massachusetts**

By his answer, the defendant asserts that the plaintiff himself was negligent, that is, that the careless conduct of the plaintiff himself was the cause of and contributed to the injuries that he suffered. Now, if that is true, the verdict should be for the defendant.<sup>19</sup>

**Michigan**

I have already stated to you that to entitle the plaintiff to recover, you must find, from a preponderance of the evidence that the plaintiff himself was free from contributory negligence. Contributory negligence, in order to constitute a defense, must have been negligence contributing to the injury itself, for which the action is brought. Contributory negligence is such action as contributes by direct consent to or participation in the injury complained of. One can not recover for an injury caused by another if his own negligence contributed thereto. Where a party by his own negligence contributes to his own injury, he

<sup>16</sup> *Luchene v Zukowski*, Superior Court, Lake County, Indiana, No 19034. See also *Livingston v Rice*, 96 IndApp 176, 184 NE 583.

<sup>17</sup> *Fullenwider v Brawner*, 224 Ky 274, 6 SW2d 264. See also *R B Tyler Co v Cuid*, 240 Ky 253, 42

SW2d 298, *Colonial Supply Co v Bramlett*, 249 Ky 382, 60 SW2d 969.

<sup>18</sup> *Riley v State for use of Walker*, 140 Md 137, 117 A 237.

<sup>19</sup> *Chapman v Burnett*, 241 Mass 386, 135 NE 375.

can not recover excepting where the defendant is guilty of gross negligence, and there is no claim of gross negligence in this case <sup>20</sup>

#### Missouri

(1) Even though you find from the evidence that the driver of the truck was negligent, yet, if you further find from the greater weight of the credible testimony that plaintiffs' daughter was also negligent, as defined in other instructions, and that that negligence directly contributed to her death, the plaintiffs can not recover <sup>21</sup>

(2) If you find from the evidence that plaintiff negligently moved into the path of the automobile \* \* \* when said automobile was so close to plaintiff that it was impossible for defendant O to have avoided the collision, and that in so doing, if you so find, plaintiff was not exercising ordinary care, and that such failure, if you so find, directly caused or contributed to plaintiff's injuries, then you should find that plaintiff is guilty of contributory negligence and he can not recover herein, and your verdict must be in favor of both defendants. <sup>22</sup>

#### Montana

(1) To bar a recovery, contributory negligence must have directly contributed to the injury at the time it was inflicted, it must have been a proximate cause of the injury <sup>23</sup>

(2) The essence of contributory negligence is a want of ordinary care on the part of the plaintiff, which is a proximate cause of the injury, not only must the negligence of one injured by the culpable negligence of another contribute to the injury, but it must contribute as a proximate cause, and not as a remote cause <sup>24</sup>

#### Ohio

(1) I charge you that if you find from the evidence, by a preponderance thereof, that the defendant's driver of this truck was negligent and you further find by a preponderance of the evidence that the plaintiff was guilty of contributory negligence

<sup>20</sup> Flannigan v Harder, 268 Mich 564, 256 NW 549 See also Rowland v Brown, 237 Mich 570, 213 NW 90, Oliver v Ashworth, 239 Mich 53, 214 NW 85, Essenberg v Achterhof, 255 Mich 55, 237 NW 43

<sup>21</sup> Carlton v Stanek, 225 MoApp 646, 38 SW2d 505 See also Smith v Star Cab Co, 323 Mo 441, 19 SW 2d 467, Robertson v Scoggins (Mo

App), 73 SW2d 430

<sup>22</sup> Le Grand v U-Drive-It Co (Mo SupCt), 247 SW2d 706

<sup>24</sup> Fulton v Chouteau County Farmers' Co, 98 Mont 48, 37 P2d 1025

<sup>24</sup> Fulton v Chouteau County Farmers' Co, 98 Mont 48, 37 P2d 1025



which contributed in the slightest degree to his injuries, and that such contributory negligence was a direct and proximate cause of his injuries, then your verdict must be for the defendant <sup>25</sup>

(2) The plaintiff, in order to recover at all, must himself be free from negligence, and by that I mean carelessness directly causing or contributing to this collision.

So that, if you find that the defendant was negligent in any of the respects I have named, directly causing the collision, and the plaintiff himself was free from negligence directly causing or contributing to it, he is entitled to recover.

If the defendant was not negligent, or if this collision was due to the negligence of the plaintiff, or directly contributed to by him, then the plaintiff is not entitled to recover, and your verdict should be for the defendant

The principal question in this case is which of these parties was on the wrong side of the highway. The evidence is quite conflicting in that respect. It will be for you to find the truth <sup>26</sup>

#### Oklahoma

(1) You are instructed that "contributory negligence" is negligence of the plaintiff or of the person on account of whose injury the action is brought, amounting to a want of ordinary care, and proximately contributing to bringing about the injury complained of. In order to constitute such negligence as will bar a recovery for damages, two elements must concur. First, a want of ordinary care on the part of the plaintiff; second, a proximate connection between this want of ordinary care and the injury complained of. <sup>27</sup>

#### Oregon.

If, after a complete survey of this evidence, in your deliberations, you have reached the conclusion that both of the parties were negligent, that the defendant was negligent in one or more of the particulars, and that likewise the plaintiff himself was negligent, as is alleged, in one or more of the particulars, and

<sup>25</sup> *Fightmaster v Mode*, 31 OhApp 273, 167 NE 407. The court in speaking of the instruction said "Plaintiff complains of the use of the words 'in the slightest degree', but in *Chesrown v Bevier*, 101 Oh St 282, at page 284, 128 NE 94, it is said, while the words 'any degree' are to be preferred, the use of the

words 'slightest degree' is not erroneous." See also *Bartson v Craig*, 121 OhSt 371, 169 NE 291, *Rogers v Ziegler*, 21 OhApp 186, 152 NE 781.

<sup>26</sup> *Sumner Co v Fisher*, 28 Oh App 219, 162 NE 639.

<sup>27</sup> *Haskell v Kennedy*, 151 Okl 12, 1 P2d 729.

that such negligence, however slight, contributed to the bringing about of the accident, then the law leaves the parties where it finds them. In other words, you are not called upon to decide which party is more negligent or more to blame. The law provides that when that state of affairs exists and you find that the evidence here, from the witness stand, shows that they were both negligent, and that their negligence contributed jointly, or otherwise, to bring about the casualty, then, the law leaves them just where it finds them and the plaintiff would not be entitled to recover; the verdict would be for the defendant in that case, because the plaintiff has instituted the case and has not established the case <sup>28</sup>

#### Pennsylvania

Now, the plaintiff alleges that this accident happened by reason of the negligence of Mr. S, the defendant. And you must always remember, in cases of this kind, that your attention should be directed to the determination of the question whether the plaintiff has proved the negligence which he alleges. There is no dispute in this case about the accident, no dispute about the collision, both sides admit it, but the question which you are to determine, in the first instance, is. Has Mr. P proved the negligence of Mr. S? Until that is proved by the plaintiff, by the weight of the evidence, there can be no recovery for Mr. P. And, in the second place, you must determine whether the plaintiff by negligence contributed, in any way, to the injury; because if you find that to be the fact, then there could be no recovery by Mr. P, and the law would leave these parties precisely in the position in which they were before the suit was brought. That is to say, if you find that Mr. P was negligent, and if his negligence contributed in any degree to this injury, it would be your duty to find a verdict in favor of the defendant; because you are not to weigh the negligence of the defendant, and you are not to say that the negligence of the defendant was greater than the negligence of the plaintiff. You are not to decide it in that way. The law is that if the plaintiff's negligence contributed, in any degree, to the injury, it bars his recovery—he can not recover <sup>29</sup>

#### Vermont

If you find that plaintiff's injuries were occasioned solely by the failure of C. B. to handle his automobile properly after the

<sup>28</sup> Riley v Good, 142 Or 155, 18 113 A 375 See also Wolf v C  
P2d 222 Schmidt & Sons Brew Co, 236 Pa

<sup>29</sup> Pickering v Snyder, 270 Pa 139, 240, 84 A 778

contact between his automobile and the defendant's automobile, then in such case, the jury must find the defendant not guilty.<sup>30</sup>

#### Virginia

Not every act of negligence which a plaintiff is committing at the time an event occurs that results in his injury will bar his recovery against the person whose negligence was a proximate cause of the event. To bar his recovery, his negligence must have been a failure to use due care with respect to the event which resulted in his injury, and must have borne such a relationship to that event that, if he himself had not been negligent, he would have received no injury from the negligence of the defendant. It is not sufficient to bar his recovery that, if he had not been negligent, the event might not have resulted in his being injured, or might, or even would, not have resulted in injuring him as seriously as it did.<sup>31</sup>

#### Washington

If you find from the evidence that has been introduced that both the plaintiff and the defendant were guilty of negligence (that is, did not use the degree of care which an ordinarily prudent person would use under the circumstances and conditions in which they were situated), then and in that event your verdict should be for the defendant. A good guide to determine whether the plaintiff was guilty of negligence contributing to the injury is. Would there have been no accident and no injury to the plaintiff but for negligence of the plaintiff? And, finally, did plaintiff, under all the circumstances of the case, exercise that degree of care which an ordinarily prudent man would have used under the same circumstances? If you find that the plaintiff did not use such degree of care, then he can not recover in this action.<sup>32</sup>

#### Wisconsin

The sixth question is this

If you answer the fifth question "Yes," then answer this:  
Were the plaintiff L. H. B.'s injuries a natural result, in whole or in part, of his own negligence?

You will notice that you are not to answer the sixth question unless you answer the fifth question "Yes."

<sup>30</sup> Bennett v. Robertson (Vt), 177 A 625

<sup>31</sup> Morris v. Dame's Exr., 161 Va 545, 171 SE 662

<sup>32</sup> Anderson v. Kinnear, 80 Wash 638, 141 P 1151. See also De Lys v

Powell-Sanders Co., 90 Wash 31, 155 P 407, Danielson v. Carstens Packing Co., 121 Wash 645, 210 P 12, Mattson v. Cragin, 149 Wash 638, 272 P 36

Here again is presented the question of whether there is a relation of cause and effect between negligence on the part of a plaintiff and his or her own injuries. Each presents that simple question of the relation of cause and effect.

Negligence is a cause of a result when it alone produces it or cooperates with some other cause in producing it jointly as a natural result.

As I have said, there may be more than one cause of such a result, that is, such an injury, as this plaintiff received. The negligence of a plaintiff alone may produce it, or the negligence of that plaintiff and of others may jointly produce it. It is for you to say whether in this instance the negligence of the plaintiff named in the question caused, in whole or in part, the injuries that that plaintiff received at the time in question.<sup>33</sup>

**§ 342. Last clear chance; discovered peril; humanitarian doctrine.**

**Federal**

**District of Columbia**

But suppose you should find, on the first branch of the case, that the defendant driver was negligent in one or more of the particulars charged in the declaration, and that that was a direct and immediate cause of the accident and the injury to the plaintiff, but that in viewing the evidence on both sides, you thought the defendant had made out the defense of contributory negligence; that is to say, that the plaintiff herself, by her own failure to exercise reasonable care for her own safety, had contributed to this accident and to her injury—I say, if you should stop there, there must be a verdict for the defendant.

But there is one more thing to be considered, if you come to that point, because the law is that even though the plaintiff may have been guilty of negligence which contributed to the accident and the injury by putting herself in a position of peril, yet if thereafter the defendant, seeing the position in which she was, had an opportunity, by the exercise of reasonable care and prudence, to save her from the consequences of her negligence, it was his duty to do so, and if he failed to do so, and that was the immediate proximate cause of the injury to the plaintiff, she may still recover. That is what is called the last clear chance.<sup>34</sup>

<sup>33</sup> *Brown v Haertel*, Circuit Court, Marathon County, Wisconsin, see 210 Wis 345, 352, 354, 244 NW 630, 633, 246 NW 691.

<sup>34</sup> *Chi Heurich Brew Co v McGavin*, 56 AppDC 389, 16 F2d 334.

**Vermont**

If both plaintiff and defendant H. were negligent, and if the negligence of both created the perilous situation in which they were just before the collision, nevertheless, if there was time just after such negligence occurred, during which H could reasonably have prevented the collision but the plaintiff could not, then she can recover notwithstanding her negligence which contributed to the perilous situation.

Unless H was negligent in failing to discover plaintiff's peril and avoid the collision, there can be no recovery on the theory that H. had the last chance to avoid it.<sup>35</sup>

**Alabama**

The court charges the jury that contributory negligence on the part of plaintiff's intestate, which will bar recovery by the plaintiff, must be such that it caused the injury and death of plaintiff's intestate or proximately contributed thereto, and even though you find from the evidence that the plaintiff's intestate was guilty of contributory negligence, if such contributory negligence was merely the cause of a condition, upon which negligence of the defendant, in failing to use the means within his power to avoid the injury, after becoming aware of the peril of plaintiff's intestate, operated as the sole, proximate cause of the injury and death of plaintiff's intestate, such contributory negligence on the part of plaintiff's intestate, if you find that there was such contributory negligence, will not prevent a recovery

The court charges the jury that even if you find from the evidence in this case that the plaintiff's intestate was guilty of contributory negligence, yet if you further find from the evidence that the defendant became aware of the peril of plaintiff's intestate in time to avoid inflicting the injury by the proper use of preventive means at his command, but negligently failed to resort to such means, the plaintiff is entitled to recover<sup>36</sup>

**Arkansas.**

Ordinary care requires of every man who drives a motor vehicle upon a public highway to keep a lookout for vehicles or persons who may be upon the highway and to keep his motor vehicle under such control as to be able to check the speed or to stop it if necessary, to avoid injury to others when danger is apparent, and if, in this case, you should find that

<sup>35</sup> Henry W Putnam Memorial Hosp v Allen, 34 F2d 927

<sup>36</sup> Faulkner v Gilchrist, 225 Ala 391, 143 S 803

the driver of defendant bus, discovered the peril of deceased S, and by the exercise of ordinary caution and care could have avoided a collision, and failed to do so, then in that event he would be guilty of negligence <sup>37</sup>

#### California

There has grown up in our law a certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case, and which is known as the doctrine of last clear chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the plaintiff and defendant were negligent.

The doctrine of last clear chance may be invoked if, and only if, the jury find from the evidence

(1) That the plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger,

(2) That defendant knew that plaintiff was in a position of danger and further knew, or in the exercise of ordinary care should have known, that the plaintiff was unable to escape therefrom, and

(3) That thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care, but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure.

If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions, the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff. <sup>38</sup>

#### Connecticut

Before the doctrine of supervening negligence \* \* \* can be applied in this case the jury must be in a position to conclude from the evidence that there was a time after the plaintiff started to cross the traveled portion of Connecticut Avenue, when H was sufficiently distant from the plaintiff

<sup>37</sup> Roark Transp, Inc v Sneed, San Francisco, 47 Cal2d 729, 306  
188 A1k 928, 68 SW2d 996 P2d 432

<sup>38</sup> Brandehus v City & County of

so that he, H, should have seen the plaintiff and realized that he was either unconscious of the approach of the automobile or for some other reason, would not guard himself from danger, and thereafter with the exercise of due care, could have avoided striking the plaintiff. Unless such an opportunity were reasonably present for the defendant H to stop his car after the plaintiff's position of peril should have been known to him, and unless the jury so find and also find that H. should have known then that the plaintiff would not avail himself of an opportunity to escape, the jury will have no occasion to give further consideration to this contention.<sup>39</sup>

#### Delaware

But, if G. P. F. could, by the exercise of due care and caution on his part, have avoided the accident, it was his duty to do so, and his failure so to do would prevent both him and his wife, E. R. F., from recovering in these actions no matter if the truck of the defendant company had been left on the paved portion of the highway aforesaid, in violation of the statutes, and no lookout was kept or maintained by the defendant. The law does not permit anyone to recover damages from another for injury, if his own negligence has contributed thereto, or where, by the exercise of reasonable care, he could have avoided it, no matter how great the negligence of such other person may have been. This is what is generally known as the "last clear chance rule," and if the jury believe that the plaintiff, G. P. F., had a clear chance, by the exercise of reasonable care, to avoid the accident, and failed to make use of this chance, then such neglect on his part would constitute the proximate cause of the accident and the defendant company would be free from liability in both cases and there could be no recovery in either of these suits.<sup>40</sup>

#### Florida

In this case, if you should find from the evidence that the deceased, E. D., was careless and negligent in exposing himself to danger, but that after the said E. D. had so exposed himself to danger the driver of defendant's automobile could have avoided the injury by using ordinary care in keeping his automobile under proper control as he drove around the curve and by keeping a proper lookout ahead and that said driver failed to use such ordinary care and that his failure in this respect was the direct cause of the injury, then you should find for the plaintiff.

<sup>39</sup> Paskewicz v Hickey, 111 Conn 219, 149 A 671      erick, 35 Del (5 W W Harr ) 569, 171 A 181

<sup>40</sup> Island Express, Inc v Fred-

If you find from the evidence that the conditions made and placed around the torn bridge by the deceased E. D., and his coworkers were such that any reasonably careful driver of an automobile approaching the bridge from either direction and observing reasonable care as to speed and lookout ahead would see the dangerous condition of the bridge in time to stop his car and avoid the injury, then you should find that there was no contributory negligence on the part of the deceased, E. D. <sup>41</sup>

#### Indiana

If you find from the evidence that defendant in operating the automobile in question saw plaintiff in a dangerous position in her effort to cross Pennsylvania Street as alleged in the complaint, and that by the exercise of reasonable care on her part she, the defendant, could have, between the time of the discovered danger and the accident, avoided striking plaintiff but did not do so and plaintiff was injured thereby, then you will be justified in finding for the plaintiff even though by her own negligence she originally placed herself in such dangerous position. This is known as the doctrine of last clear chance or discovered peril and is the application of a humanitarian rule. <sup>42</sup>

#### Iowa

(1) If plaintiff's intestate failed to exercise ordinary care for his own safety, and such act or acts contributed in any degree to the cause of said injury, then the plaintiff can not recover in this action, unless you further find that the driver of defendant's car, after discovering the dangerous position of plaintiff's intestate, failed to exercise ordinary care and prudence, under the circumstances then existing, to avoid the injury. <sup>43</sup>

(2) If you find that the plaintiff was negligent, the defendant driver is still liable if you find from the evidence that the plaintiff, at the time in question, was in peril, and that the defendant:

- (1) had knowledge of plaintiff's presence; and
- (2) knew that plaintiff was in peril, or might have so known by the exercise of ordinary care; and
- (3) having the ability to avoid the injury to plaintiff, thereafter fails to use ordinary care to stop his automobile and prevent injury to the plaintiff. <sup>44</sup>

<sup>41</sup> Merchants' Transp Co v Daniel, 109 Fla 496, 149 S 401

<sup>42</sup> Caffery v Summers, Circuit Court, Marion County, Indiana, No 40854

<sup>43</sup> Smith v Spirek, 196 Ia 1328, 195 NW 736

<sup>44</sup> Menke v Peterschmidt, 246 Ia 772, 69 NW2d 65



**Kansas**

If the defendant ought to have realized that the plaintiff was getting into a dangerous position in front of his machine, then he was required to exercise increased care to avoid collision with her <sup>45</sup>

**Kentucky**

(1) Where both parties are negligent, the one with the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is held wholly responsible for it; his neglect being deemed the direct and proximate cause of it. <sup>46</sup>

(2) On the other hand, if the jury believe from the evidence that the defendant, by his agent, the driver of the said automobile, saw, or by the exercise of ordinary care could have seen, the position of peril of plaintiff such a distance ahead of defendant's said automobile, that by the exercise of ordinary care and the use of the means at his command he could have stopped his said automobile, slacked its speed, or changed its course in time to have avoided striking plaintiff and negligently failed so to do, then the law is for the plaintiff and you will so find. <sup>47</sup>

**Michigan**

(1) If you find that plaintiff's decedent was guilty of contributory negligence as I have heretofore defined it to you, then he can not recover in this case unless the defendant A. failed to do something which he could have done to avoid the collision after he discovered the position of peril of plaintiff's decedent, or by the exercise of due care and caution on his part should have discovered such condition of peril on the part of the plaintiff's decedent <sup>48</sup>

(2) Contributory negligence does not prevent recovery in a case where the defendant knows or ought to know, by the exercise of ordinary care, of the preceding negligence of the plaintiff, and by his subsequent negligence, does plaintiff an injury. That is, even though the plaintiff were guilty of contributory negligence, and has placed herself in a position of danger, it is still incumbent upon the defendant to do that which an ordinarily prudent and careful man would do to prevent the injury. <sup>49</sup>

<sup>45</sup> Coughlin v Layton, 104 Kan 752, 180 P 805

<sup>46</sup> Peak v Arnett, 233 Ky 756, 26 SW2d 1035

<sup>47</sup> Smith v Ferguson, 256 Ky 545, 76 SW2d 606, see also Colonial Supply Co v Bramlett, 249 Ky 382, 60

SW2d 969

<sup>48</sup> Kelley v Keller, 211 Mich 404, 179 NW 237

<sup>49</sup> Halzle v Hargreaves, 233 Mich 234, 206 NW 356 See also Sudinski v Krohn, 242 Mich 497, 219 NW 665

**Minnesota**

If the plaintiff was negligent in this case, and did place himself in a negligent position, and if the defendant, before the happening of the injury or accident, discovered the negligence of the plaintiff, but by and through the want of ordinary care upon his part, after discovering the danger of the plaintiff, caused by his own negligence, nevertheless ran against him and injured him, operating his machine without using ordinary care, then the plaintiff can recover and should recover a verdict at your hands. On the other hand, I charge you, gentlemen, that if the defendant, after discovering that the plaintiff had placed himself in a dangerous position, was negligent, guilty of negligence on his part, if the defendant used ordinary care on his part, then the plaintiff can not recover.<sup>50</sup>

**Missouri**

(1) The court instructs the jury that one charge of negligence made by plaintiff against defendant in this case is what is known as the humanitarian doctrine—that is, that the defendant and Mrs. W. negligently failed to use the means at hand in operating said car to avoid striking deceased, N., after they discovered or by the exercise of reasonable care could have discovered that he was in imminent danger. Now, upon this theory of the case, you are instructed that the defendant and Mrs. W. were not required under the law to stop or attempt to stop the car until they saw, or by the exercise of ordinary care could have seen, the deceased, N., was in imminent danger or peril, and then they were only required to use the means at hand to avoid striking him. And in this connection you are instructed that if you find and believe from the evidence that the deceased, N., negligently stepped from a place of safety to a place of danger immediately in front of defendant's automobile and at said time defendant and Mrs. W. were so close on him that they could not avoid striking him, then plaintiff can not recover and it is your duty to find for the defendant on this theory of the case.<sup>51</sup>

(2) The court further instructs the jury as to the first count of the petition relating to alleged personal injuries, if you believe from the evidence that as said automobile approached and reached said wagon, at the time and place referred to in the evidence, plaintiff was in a position of imminent danger and peril from the approach and movements of said automobile, and that C saw or, by using the highest degree of care, could have seen and observed plaintiff in said position

<sup>50</sup> Johnson v Scott, 119 Minn 470,  
138 NW 694

<sup>51</sup> Nickelson v Cowan (MoApp),  
9 SW2d 534

of danger, if any, in time thereafter by the use of the means at hand and with safety to said automobile and its driver and by the use of the highest degree of care to have steered said automobile to the right or north and changed the course thereof and thereby have prevented it striking said wagon, if it did, and that C failed to use the highest degree of care so to do and was thereby guilty of negligence, if you so find, and that as a direct result thereof, said automobile collided with said wagon and plaintiff was thereby injured, if you so find, then your verdict must be for plaintiff and against defendants under this instruction as to said first count of the petition, and this would be true even though you should also believe that plaintiff did not use ordinary care for his own safety and was negligent in getting into said position of peril, if any, at said time and place.<sup>52</sup>

#### New York

If a person finds himself in a place of danger through his own negligence, nevertheless, if the party who injures him saw him in such a position of danger and could have avoided the injury, there may be liability, providing it is shown that the party who saw him in the place of danger could have avoided the injury.<sup>53</sup>

#### North Carolina

You are instructed that, even though the injured party through his own negligence placed himself in a position of peril, he may recover if the one who injured him discovers, or by the exercise of ordinary care, could have discovered him in time to have avoided the injury. The defendant would not be relieved of liability by reason of the fact that he did not see him, but the law holds him to the responsibility of seeing what he could have seen by keeping a reasonably vigilant and proper lookout. You are instructed that the mere fact that a child runs in front of a moving motor vehicle so suddenly that the driver had no notice of danger does not necessarily relieve a defendant from liability. There still remains the question of whether the negligent driving of the automobile made it impossible for the driver to avoid the accident after seeing the child, or when by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury, there being a greater degree of watchfulness and care required of automobile drivers as to children than adults.<sup>54</sup>

<sup>52</sup> Brown v Callicotte (Mo), 73 SW2d 190. See also Luck v Pemberton (MoApp), 29 SW2d 197, McPherson v Premier Service Co (Mo App), 38 SW2d 277, Stewart v Kansas City Public Service Co (Mo

App), 49 SW2d 1061.

<sup>53</sup> Dino v Eastern Glass Co, Inc, 231 AppDiv 75, 246 NYS 306.

<sup>54</sup> Goss v Williams, 196 NC 213, 145 SE 169.

**Oklahoma**

(1) You are instructed that the burden rests upon the plaintiff to prove by a preponderance of the evidence, first, that the plaintiff got into danger, and, second, that the defendant discovered plaintiff's perilous position, and, third, that, after discovering plaintiff's danger, the defendant could have then prevented the injury by the use of reasonable care, and you are further instructed that "reasonable care" means that degree of care and caution that ordinarily prudent persons would use under the same circumstances <sup>55</sup>

(2) In this connection you are instructed that while it is ordinarily true the plaintiff can not recover if it is shown by the evidence introduced in his behalf that he, himself, was guilty of negligence at the time of his injury, which was a present, contributing, and proximate cause thereof, yet, notwithstanding this general rule, if the defendant's servant in charge of its automobile at the time of the accident saw plaintiff in a position of peril, it then became the duty of said defendant's servant and employee, upon discovery of such perilous position of plaintiff, to use ordinary care to avoid injuring him, and this, notwithstanding, you may believe from a preponderance of the evidence that plaintiff has been guilty of contributory negligence

In this connection you are further instructed that if you find and believe from the evidence a servant and agent in charge of defendant's automobile saw plaintiff was in a position of peril in time to avoid injuring him by the exercise of ordinary care by means reasonably within the control of said defendant's servant and agent, and that said servant and agent of defendant failed so to do, then you are instructed plaintiff would be entitled to recover, and your verdict should be for the plaintiff.

But in this connection, you are instructed that if the driver of defendant's automobile, after discovering plaintiff's position of peril, if you find such to be a fact, then used ordinary care to prevent injury to plaintiff, the use of such ordinary care under such circumstances as outlined, would fulfil his duty under the law, and if you find that he did so from the evidence in the case, then under such circumstances plaintiff would not be entitled to recover and your verdict should be for the defendant. <sup>56</sup>

**Oregon**

(1) If you find from the evidence that the defendant J. was backing his truck toward the north on Commercial Street

<sup>55</sup> Skaggs v Gypsy Oil Co, 169 Okl 209, 36 P2d 865 See also Easton v Branson, 145 Okl 99, 292 P 39

<sup>56</sup> Skaggs v Gypsy Oil Co, 169 Okl 209, 36 P2d 865

with the intention of turning to the west, and at that time, the defendant E was driving his truck to the east on the same street with the intention of passing J's truck, but, as E. approached J, J ran his truck in front of E's truck without signaling his intentions, E would not have a right to deliberately and ruthlessly run into J's truck, but it would be his duty to use every reasonable means and care to avoid the collision, and, if necessary and possible, to stop his car before colliding.<sup>57</sup>

(2) If you should find from the evidence that the defendant, at the time of the collision between the machine in which the plaintiff was riding and the defendant's automobile, was attempting to avert a collision, and that the plaintiff could have averted a collision by the exercise of care and caution which an ordinarily prudent man should have exercised at said time and place, then your verdict should be for the defendant.<sup>58</sup>

#### Texas

There can be no recovery if defendant, after becoming aware of the plaintiff's peril, did what an ordinarily prudent person would have done under the same or similar circumstances to avoid the injury. But the defendant must satisfy the jury that he did what an ordinarily prudent person would have done.<sup>59</sup>

#### Virginia

The court instructs the jury that if the plaintiff expects to recover upon the theory that after her danger became known to the defendant, or by the exercise of ordinary care could have become known to the defendant, and that thereafter he failed to exercise care to try to avoid the plaintiff, then you are instructed, in determining this question, that the law recognizes that the minds and nerves and muscles of men are not so accurately coordinated as to permit of instantaneous action to meet an emergency, and in order for the plaintiff to recover upon this theory, she must prove by the preponderance of all evidence, that after the driver of the defendant's car knew, or by the exercise of ordinary care could have known, of the danger in which the plaintiff was, and that thereafter he had ample space, both of time and distance in which to stop the truck and avert the accident, and that he negligently failed to do so, otherwise the plaintiff can not recover upon this theory.<sup>60</sup>

#### Washington

(1) There is one doctrine under which contributory negligence may not defeat the plaintiff's right of recovery, and that

<sup>57</sup> *Peters v Johnson*, 124 Or 237,  
264 P 459

<sup>58</sup> *Marshall v Olson*, 102 Or 502,  
202 P 736

<sup>59</sup> *Hooks v Orton* (TexCivApp),  
30 SW2d 681

<sup>60</sup> *Lucas v Craft*, 161 Va 228, 170  
SE 836

is known as the doctrine of the "last clear chance" If, in this case, R was negligently and carelessly rushing across the street and into danger, and if the driver saw him thus negligently rushing into danger in time, by the exercise of reasonable care, to avoid the accident, and failed to exercise such care when, had he done so, the accident would have been avoided, then, in that case, negligence of the driver and not of the boy would constitute the proximate cause of the accident.<sup>61</sup>

(2) In connection with the alleged negligence upon the part of the deceased, and upon the part of the defendant, R. P., there is another rule of law which has a twofold application, commonly known as the doctrine of "last clear chance" In the application of this doctrine I instruct you that if you believe from the evidence that the deceased, O. P. S., was negligent in failing to see the approaching automobile and move out of the way so that it could pass in safety, or negligently attempted to cross the road in front of the oncoming automobile, such negligence on his part would not defeat the plaintiff's right to recover, if the said R. P. in driving said automobile actually saw that the deceased, O. P. S., was in danger, or should have appreciated the fact that he was in danger, if you so find, and that the said R. P., by the exercise of reasonable care, could have thereafter avoided running into the deceased, O. P. S., and negligently failed to exercise such care The other application of the doctrine is that if you believe that the deceased, O. P. S., was negligent in failing to see the approaching automobile and move out of the way, so that it could pass in safety, or negligently attempted to cross the road in front of the oncoming automobile, and if you believe that his negligence had, prior to the instant of injury, terminated or culminated by placing him in a situation of danger such that the exercise of ordinary care on his part alone would not thereafter have avoided the injury without the cooperation of ordinary care on the part of said R. P., and that she, by keeping a reasonably vigilant lookout, could have seen and appreciated the exposed condition of the deceased in time to have avoided the injury, by the exercise of reasonable care, and negligently failed to keep such lookout or to exercise such care, then the deceased's prior negligence would not bar the plaintiff's right of recovery.<sup>62</sup>

(3) But if you find that the plaintiff negligently placed himself in a dangerous situation, and that the driver of the automobile could not, in the exercise of reasonable care, have seen his perilous situation in time to have avoided

<sup>61</sup> *Stubbs v Boone*, 164 Wash 368,  
2 P2d 727

<sup>62</sup> *Stephenson v Parton*, 89 Wash  
653, 155 P 147

injuring him, or if you find that the plaintiff's negligence, if any, had not terminated or culminated in a situation of peril from which the exercise of reasonable care on his part would not thereafter extricate him, but that he could have, by the exercise of ordinary care, extricated himself from the perilous situation, but failed to exercise such care, then the plaintiff can not recover. <sup>63</sup>

#### West Virginia

The mere negligent act of one person will not excuse negligent injury to him by another. If, therefore, a person who negligently places himself in a situation of imminent danger is injured by one who, by the exercise of reasonable care could have avoided such injury, the negligence of the former will not bar recovery. <sup>64</sup>

#### Wisconsin

If an automobile driver on the highway discovers that another car is not going to yield half of the roadway, he should turn to his right as far as is reasonably necessary, or as he reasonably can, to avoid an impending collision. Merely because he has yielded half of the roadway to an approaching car does not justify him in holding to his course regardless of consequences, provided he can reasonably, after seeing the danger, turn further to the right and avoid a collision. <sup>65</sup>

### § 342A. Comparative negligence. <sup>66</sup>

#### Georgia

If you believe that a preponderance of the evidence fails to show that the defendant was more negligent in the matter which caused the injuries to R. G. than was R. G., then you should find for the defendant. <sup>67</sup>

#### Nebraska

(1) If you find from the evidence that the defendant was guilty of negligence, you will then determine from the evidence whether the deceased was guilty of negligence. If you find that both were negligent, then it is your duty to fix the degree

<sup>63</sup> *Hartley v Lasater*, 96 Wash - 407, 165 P 106

<sup>64</sup> *Attell v Laird*, 106 WVa 717, 146 SE 882

<sup>65</sup> *Graveen v Prellwitz*, Circuit Court, Marathon County, Wisconsin. See also *Zutter v O'Connell*, 200 Wis 601, 229 NW 74

<sup>66</sup> See also Chapter 53, Comparative Negligence

<sup>67</sup> *Huckabee v Giace*, 48 GaApp 621, 173 SE 744

The doctrine of comparative negligence exists in Georgia. *Southern Exp Co v Cumming*, 25 GaApp 52, 102 SE 456; *Hines v Ewitt*, 25 Ga App 606, 103 SE 865; *Fairburn & A R & Elec Co v Latham*, 26 Ga App 698, 107 SE 88; *Georgia R & Power Co v Reid*, 26 GaApp 720,

of the deceased's negligence as compared with that of the defendant. If you find from the evidence that each was guilty of an equal degree of negligence, or that the negligence of the deceased was greater than that of the defendant, then you should, in either event, return a verdict for the defendant. If, however, you find from the evidence that the defendant's negligence was gross and the deceased's negligence was slight, then the slight negligence of the deceased would not defeat his recovery in this action, but in making up your verdict you should consider such contributory negligence of the deceased in mitigation of the damages in proportion to the amount of the contributory negligence attributable to the deceased when compared to the combined negligence of the deceased and defendant.<sup>68</sup>

(2) The jury are instructed that if, on the trial of an action brought to recover damages for injuries to a person and his property caused by the negligence of another, the plaintiff is found to be guilty of negligence directly contributing to the injuries complained of, he can not recover, even though the defendant was negligent, unless the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of the defendant falls in any degree short of gross negligence, under the circumstances, the contributory negligence of the plaintiff, however slight, will defeat a recovery, and even when the plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damages sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained.<sup>69</sup>

#### Wisconsin

I will now instruct you upon the fourteenth and seventeenth questions together.

The fourteenth question is this:

If you find that the plaintiff, M. B., was negligent in her manner of operating the B. automobile, then answer this

107 SE 100, *Davies v West Lbr Co*, 32 GaApp 460, 123 SE 757, *Southern R Co v Wessinger*, 32 GaApp 551, 124 SE 100, *Lamon v Perry*, 33 GaApp 248, 125 SE 907, *Kirk v Savannah Elec & Power Co*, 50 Ga

App 468, 178 SE 470

<sup>68</sup> *Emel v Standard Oil Co*, 117 Neb 418, 220 NW 685

<sup>69</sup> *Patterson v Kerr*, 127 Neb 73, 254 NW 704



question: What proportion of all the negligence of all persons which produced the collision is attributable to the plaintiff M. B.?

The seventeenth question is this.

If you find that the defendant, H. H., was negligent in his manner of operating his automobile, then answer this question: What proportion of all the negligence of all the persons which produced the collision in question is attributable to H. H.?

It appears that M. B. was the operator of one car and H. H. the operator of the other, involved in this collision. You may find that the collision was caused as the natural result of negligence on the part of one or of both. If it was caused as the natural result of negligence on the part of one, then his or her negligence was the whole or 100 per cent of the negligence which produced the collision.

In case both of these drivers are found to have been negligent and to have thereby together produced the collision, then the sum of their negligence together constitutes 100 per cent of the negligence which produced the collision, and you are to decide in such case what proportion thereof, expressed in percentage, or in a fractional share, is attributable to each of these two drivers. You may express your answer in percentage, such as 40 and 60 per cent, or 25 and 75 per cent, or 50 and 50 per cent, or in such other figures as in your judgment it should be expressed, the whole being considered as 100 per cent. Or you may answer it by the use of fractions, such as one-half, one-third, one-fourth, five-sixths, or some such fraction.<sup>70</sup>

### § 343. Acts in emergencies or sudden peril.

#### Alabama

Where one is exposed to a danger, enhanced suddenly by the dangerous condition under which the danger must be met, he or she is not necessarily guilty of contributory negligence because he or she does not exercise the best judgment, or take the best measures for his or her safety, but under the stress of danger or sudden peril, under such emergency and exigency, the person so suddenly confronted by such condition must conduct him or herself as a reasonably prudent person would do if thrust into the same or like circumstances, and it is

<sup>70</sup> *Brown v Haertel*, Circuit Court, 210 Wis 345, 352, 354, 244 NW 630, Marathon County, Wisconsin, see 633, 246 NW 691

for you to say whether, under sudden peril and danger, a reasonably prudent person would have done as intestate did in answering whether or not she was guilty of contributory negligence when thrust into that condition <sup>71</sup>

#### Arkansas

(1) Where the operator of a motor vehicle is, by a sudden emergency, placed in a position of imminent peril to himself or to another, without sufficient time in which to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required of him under ordinary circumstances, and is not liable for injuries caused by his machine or precluded from recovering for injuries to himself or his machine if an accident occurs, even though a course of action other than that which he pursues might be more judicious, provided he exercises ordinary care in the stress of circumstances to avoid an accident. <sup>72</sup>

(2) If C was not otherwise negligent, negligence can not be predicated upon the fact that C. chose to strike the car rather than the man when one collision or the other was unavoidable. If C's negligence rendered it necessary for him to make his choice, he is liable for the damages resulting from his choice, for the reason that one can not shield himself behind an emergency created by his own negligence, but, if C. was not guilty of negligence producing the emergency, he would not be liable for the consequences of his choice, unless there was negligence in making his choice. <sup>73</sup>

#### California

(1) You are instructed that one who, without negligence upon his part, is suddenly confronted with imminent danger or seeming imminent danger, is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation, he is required to act only as a reasonably prudent man would act, under similar circumstances. <sup>74</sup>

(2) A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only that care that an ordinarily prudent per-

<sup>71</sup> *Norwood Transp Co v Bickell*,  
207 Ala 232, 92 S 464

<sup>72</sup> *Coca-Cola Bottling Co v Doud*,  
189 Ark 986, 76 SW2d 87

<sup>73</sup> *Riceland Petroleum Co v*  
*Moore*, 178 Ark 599, 12 SW2d 415

<sup>74</sup> *Miner v Dabney-Johnson Oil*  
*Corp*, 219 Cal 580, 28 P2d 23

son would exercise in the same situation. If, at that moment, he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by an ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer.<sup>75</sup>

(3) If the evidence convinces you that the plaintiffs found themselves placed in sudden peril by or through the negligence of the defendant, their conduct under such circumstances is to be judged in view of the circumstances and surroundings and not by the standard applicable to one not conscious of being in danger. The plaintiffs under such circumstances, if you so find, were required to use ordinary care to protect themselves, which was the care an ordinarily prudent person would use under the same or similar circumstances, considering the danger, proximity of the truck, its speed and movement, plaintiffs' position on the highway, and all the other facts and circumstances proved to have existed or occurred at the time of the accident. It must be remembered that a person in great peril, when action is necessary to avoid it, is not required to exercise that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances.<sup>76</sup>

(4) You are further instructed that the act of a pedestrian on a public highway in running in front of an automobile, as the result of fright or terror, caused by the sudden discovery of the automobile near him, or by a noise caused by the automobile, does not necessarily constitute contributory negligence on his part, or, in other words, if the act of the defendant caused fear and loss of presence of mind on the part of the plaintiff, so as to impel her to rush into danger, as stated before, her mere error or mistake of judgment in so acting shall not be taken by you to be contributory negligence on her part.<sup>77</sup>

(5) There are certain conditions under which one is excused from adopting cautionary measures which should otherwise have been taken, and where actions, which under ordinary circumstances would constitute negligence, may be held to be those which a reasonably prudent man would take, under similar circumstances. This is the doctrine of "imminent peril." It is simply stating, in another way, the familiar test as to what conduct will constitute negligence, to wit. Did the party charged

<sup>75</sup> Christensen v Bergmann, 148 293 P 844  
CalApp2d 176, 306 P2d 561

<sup>77</sup> Raymond v Hill, 168 Cal 473,

<sup>76</sup> Mogle v Hunt, 110 CalApp 177, 143 P 743

with negligence omit to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or did he do something which a prudent and reasonable man would not do, under similar circumstances? One who, without negligence upon his part, is suddenly confronted with imminent danger or seeming imminent danger, is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation, he is required to act only as a reasonably prudent man would act under similar circumstances. The imminent peril must arise from a sudden emergency, but where that emergency is created by the automobilist, or where he brought about the perilous situation, through his own negligence, he can not avoid liability upon the ground that his subsequent acts were done in the stress of emergency

One can not shield himself behind an emergency created by his own negligence. The rule can be invoked only by those who are without fault <sup>78</sup>

#### Georgia

(1) The court charges you that if you believe from the evidence that plaintiff was negligent, not amounting to the failure to use ordinary care, and was suddenly put in a place of peril by the defendant, with insufficient time to consider all the facts and circumstances which surrounded him, the law would not require of him the same degree of care and caution that it would of a person who had ample time for the exercise of his judgment. In other words, when a person is suddenly put in a position of peril by the negligence of another, and where, under the circumstances, the emergency is so great that he has to act without having time to think, then a person confronted with such emergency is not held to as strict accountability as a person who has ample time to consider the facts and circumstances and the situation <sup>79</sup>

(2) I charge you, gentlemen, if you find in this case from the evidence that if, as the automobile in which the plaintiff was a passenger, or a guest in this case, approached the automobile of the defendant, an emergency arose, and that the emergency was proximately caused by the negligence of the defendant, as contended by the plaintiff, and that in order to avoid a collision and consequent injury, plaintiff's husband swerved and turned his automobile to the left side of the road, and that the collision occurred on the left side of the road, and his action in turning

<sup>78</sup> Vedder v Bireley, 92 CalApp 52, 267 P 724

<sup>79</sup> Cochran v Kendrick, 43 GaApp 135, 158 SE 57

his automobile to the left of the highway was in the exercise of reasonable care and prudence, such as a man would naturally use in an endeavor to avoid injury, the plaintiff may recover in this case, although the law of the road and the law of the state requires drivers of vehicles to keep to the right side of said highway in the direction in which the vehicles are traveling.<sup>80</sup>

**Idaho.**

You are instructed that a man is negligent under the law when, in any given circumstance, he fails to use that degree of care and prudence for the lives and property of others as an ordinarily careful and prudent man would use in the same circumstances.

And you are further instructed that in determining whether a man is negligent in any given set of circumstances, there should be taken into consideration all of the surrounding facts, the time within which the person in question could act, the fact whether he had reason to believe that he was in imminent peril himself, and any and all circumstances which would or could affect the mind, reason or judgment of any ordinarily reasonable man, that is to say, the test is not what a person would do under ideal circumstances when he had plenty of time to plan and think, but the test is what an ordinarily reasonable and prudent man would or could do under those specific circumstances and under the specific time given to act.<sup>81</sup>

**Illinois.**

(1) The court instructs the jury if you believe from the evidence in this case that A. O., immediately prior to the accident in question, and without fault on his part, was placed in a sudden emergency with the peril of a collision imminent, as the result of M. M.'s car suddenly appearing in the same lane of traffic on which he was proceeding, then you are instructed under such state of proof, if such is the proof, that A. O. would not be required to use the same degree of self-possession, coolness and judgment as when there is no imminent peril.<sup>82</sup>

(2) If you find from the evidence that the defendant, R. L., without fault on his part, was confronted with sudden danger or apparent sudden danger, you are instructed that the law does not require of him the same degree of judgment or presence of mind as under circumstances not involving such danger, if any you find. If you find such danger, the law is that he must exercise

<sup>80</sup> *McBrayer v Ballenger*, 94 Ga App 620, 95 SE2d 718

<sup>81</sup> *McCoy v Kregel*, 52 Idaho 626, 17 P2d 547

<sup>82</sup> *O'Brien v Musfeldt*, 345 IllApp 12, 102 NE2d 173. See also *Bunch v McAllister*, 266 IllApp 248.

such judgment and care which a reasonable man would exercise under similar circumstances to those appearing in this case from the evidence herein. If you so find that he was, without fault on his part, confronted with sudden danger or apparent sudden danger, and that in attempting to avoid such danger he lost control of his car, while exercising the care required by this instruction in the presence of such danger, so that his said car crossed over to the East half of the highway at the time of the collision in question, and if you further find that he was not guilty of any other negligence which was the proximate cause of the collision in question, then you should find the defendant R. L. not guilty.<sup>83</sup>

#### Indiana

If you find that the defendant was guilty of the negligence charged in the complaint, and by reason thereof the plaintiff was suddenly and unexpectedly placed in a position of great apparent danger, this is a proper circumstance for you to consider in respect to his own conduct. The law does not exact of a person so situated, the coolness and circumspection which is required of one advised of danger or apparent danger long enough beforehand to deliberate upon the best means to meet and provide against it.<sup>84</sup>

#### Iowa

If you find from the evidence the defendants did not exercise ordinary skill and care in managing the machine, or that the person driving the machine was at the time unable to control it on account of his lack of knowledge or experience, even though you find there were defects in the same by reason of which he was unable to manage the car, nevertheless the driver would not be justified in turning it to the left and upon the sidewalk, where persons were traveling, unless you were satisfied there was a cause for an emergency requiring him to do so, in order to avoid injury. But even then, if you further find they did not have control of the car so that, by reasonable effort and care, they could have prevented the same from running upon the sidewalk where people were passing and repassing, or if you find that by the exercise of reasonable care and diligence and a proper knowledge of the operation of the car, they could have stopped the same by the use of the appliances on the car, placed there for that purpose, and they failed

<sup>83</sup> Borst v Langsdale, 8 IllApp2d 520, 130 NE2d 520 (Court, Lake County, Indiana, No 19928, see 197 Ind 475, 151 NE 390)

<sup>84</sup> Koplovitz v Jensen, Superior

to do this, the existence of the alleged emergency will not shield them from the liability for resulting consequences.<sup>85</sup>

#### Kansas

If a driver of a vehicle is confronted by a set of circumstances which calls for quick action, without time for deliberation, and he uses his best judgment and follows the course of action which seems to him best suited to prevent a collision, he can not be found to have been negligent simply because he did not do what some other person might have done if placed in the same position and confronted by the same set of circumstances.<sup>86</sup>

#### Michigan

(1) I instruct you that where one is required to act suddenly in the face of imminent danger, the law does not require him to exercise the same degree of care as if he had time for deliberation and the full exercise of judgment, and, under such circumstances, he is not required to exercise the care which, on careful consideration of the circumstances after the accident, it may appear he might have used in order to avoid injury. If a person, through no fault on his part, or negligence on his part, is suddenly placed in a position of peril, the law makes allowance for fright and lack of judgment and excitement, providing a person invoking that rule is not guilty of negligence in placing himself in such a position of peril.<sup>87</sup>

(2) A party suddenly in peril is not required to do that which, after the peril is ended, it is seen he might have done and escaped, the law makes allowances for lack of coolness in judgment incident to such peril. A person is not expected to exercise the coolness and forethought that an uninterested bystander might show; nor is he required to take the same precaution which it might appear afterwards might have avoided

<sup>85</sup> *Carpenter v Campbell Automobile Co*, 159 Ia 52, 140 NW 225. The reviewing court in referring to the instruction said "This instruction, though not happily worded, we think was not misleading or prejudicial, and, when properly analyzed and understood, correctly states the law as applicable to this branch of the case, and, though not worded with the technical niceness that appears in the instruction asked by defendant upon this point, yet we think it more correctly states the rule which should be observed by the jury on this branch of the case, and we find

no reversible error in the giving of the same."

<sup>86</sup> *Leinbach v Pickwick Greyhound Lines, Inc*, 135 Kan 40, 10 P2d 33.

<sup>87</sup> *Rossien v Berry*, 305 Mich 693, 9 NW2d 895, affirming verdict and judgment for defendant, who collided with plaintiff's car from the rear, plaintiff appearing to have suddenly stopped or slowed down. Plaintiff's request for a charge under the "assured clear distance ahead" statute was held properly denied, under the circumstances of the case.

the injury. In this case, if you find that A. S. was driving his car in a proper, prudent and careful manner and suddenly found himself confronted with a choice of risking a collision or going into a ditch, he was not guilty of contributory negligence by reason of the fact that he did not turn his car into the ditch to avoid the collision.<sup>88</sup>

#### Minnesota

(1) If she was negligent in driving as she was driving, with the car in the condition she knew it to have been, or ought, in the exercise of reasonable care, to have known it to be and appreciated it to have been, and the emergency arose on account of her negligence, brought upon her by her own negligence, she could not escape liability by any plea of merely mistake of judgment after the emergency arose. But if she was not responsible for the emergency from the standpoint of the exercise of ordinary care, then she would not be responsible for any mere mistake or lack of judgment in attempting to control the car and operate it as it appears from the testimony she did after the emergency arose.<sup>89</sup>

(2) It is also the law that one suddenly confronted by a peril through no negligent fault of his own, who, in the attempt to escape, does not choose the best or safest way, should not be held negligent because of such choice, unless it was so hazardous that the ordinarily prudent person of like age and experience would not have made it under similar circumstances.<sup>90</sup>

#### New York

The law makes allowances for mistakes and for errors of judgment which are liable to happen upon such an emergency. In other words, the law does not demand the same coolness and self-possession which are required when there is no occasion for alarm or for loss of self-control. The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible.<sup>91</sup>

#### North Carolina

The court instructs you that a person confronted with a sudden emergency is not held by law to the same degree of care as in ordinary circumstances, but only to that degree of care which an ordinarily prudent person would use under similar cir-

<sup>88</sup> *Anderson v. Lynch*, 232 Mich 276, 205 NW 134. See also *Luck v. Gregory*, 257 Mich 562, 241 NW 862 [mod. and reh. den. 257 Mich 562, 244 NW 155].

<sup>89</sup> *Stoker v. Anderson*, 184 Minn

339, 238 NW 685.

<sup>90</sup> *Daly v. Springer*, 244 Minn 108, 69 NW2d 98.

<sup>91</sup> *Hood v. Stowe*, 191 AppDiv 614, 181 NYS 734.



cumstances. The standard of conduct required in an emergency, as elsewhere, is that of a prudent person.

The court further instructs you that this principle is not available to one who by his own negligence, brought about or contributed to the emergency. That means in simple language, that a person who creates an emergency, or contributes to it, can not take advantage of the principle.

The court instructs you that one who is required to act in an emergency is not held by law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence similarly situated would have made.<sup>92</sup>

#### North Dakota

I charge you that if a person is met with an emergency while upon the highway, an emergency that he could not anticipate and did not anticipate, and is suddenly confronted with it, he is not held to the same legal responsibility as a person that is not met with an emergency and who has ordinary conditions to meet and who has time to consider and reflect; so if in this case, the defendant came to the place and was confronted with an emergency, and he was in no way at fault about the emergency that was created or that met him, the fact that he turned to the right instead of the left, of itself, would not make him liable for negligence and liable to pay damages.<sup>93</sup>

#### Ohio

(1) I charge you that where one without fault of his own, is placed in a position of great mental stress or sudden emergency, the same degree of judgment and care is not required of him as is required of one who is acting under normal conditions. The test to be applied is whether or not the person in such a position of great mental stress or sudden emergency, did, or attempted to do, what a reasonably prudent person would have done under the same or similar circumstances. If, therefore, you find from the evidence in this case that the defendant, without fault of his own, was placed in a position of great mental stress or sudden emergency, and that while in such position, he did or attempted to do what any reasonably prudent person would have done under the same or similar circumstances, then he was not negligent.<sup>94</sup>

(2) The next question you come to then would be the question, if any, of contributory negligence, if upon the evidence or

<sup>92</sup> Barnes v. Caulbourne, 240 NC 555, 238 NW 697  
721, 83 SE2d 898

<sup>94</sup> Woodward v. Gray, 46 OhApp

<sup>93</sup> Jondahl v. Campbell, 61 ND 177, 188 NE 304

otherwise there is any inference raised whatever that the plaintiff herself did not exercise ordinary care for her own safety. There is no burden on the part of the plaintiff to prove by a greater probability of the truth that she did exercise ordinary care, it is only necessary that upon all of the evidence you do not find that there is a greater probability of the truth that she did not exercise ordinary care for her own safety. Now, by ordinary care as it applies to her, it is the same in law as it applies to all other people, ordinary care under the circumstances then existing, and I must say to you that if, upon this evidence, it should appear to you that an emergency arose, or that a condition presented itself before this plaintiff such as was not a usual or natural one, and that she was thereby confronted with an emergency, that she is only held to that degree of care that an ordinary careful person would likewise exercise under such conditions, and only as to such judgment of care as one confronted with the emergency would reasonably be expected to use at that time, and not to any hard or fast rule of what might have been done had one anticipated the sudden situation clearly at the time confronted with it, rather than the after-look <sup>95</sup>

#### Oklahoma

In event the driver of an automobile is suddenly met with an emergency which naturally would overpower the judgment of a reasonably prudent and careful driver, so that momentarily he is thereby rendered incapable of deliberate and intelligent action, and as a result injures a third person, the driver is not negligent, provided he has used due care to avoid meeting such an emergency, and after it arises he uses such care as a reasonably prudent and capable driver of an automobile would use under the unusual circumstances <sup>96</sup>

#### Oregon

(1) Where a person is placed suddenly in a position of imminent peril, without sufficient time to consider all the circumstances, the law does not require of him the same degree of care and caution as it requires of a person who has ample opportunity for the full exercise of his judgment and reason. <sup>97</sup>

(2) A pedestrian who has been exercising due care for his own safety, and who is suddenly confronted with a rapidly approaching automobile, can not be charged with contributory

<sup>95</sup> Bennett v Sinclair Refining Co, 144 OhSt 139, 57 NE2d 776, affirming judgment for plaintiff

<sup>96</sup> Wilson v Roach, 101 Okl 30,

222 P 1000 See also Richards v Rifenbery, 108 Okl 56, 233 P 692

<sup>97</sup> Goebel v Vaught, 126 Or 332, 269 P 491

negligence should he fail in the emergency to select the course which would extricate him safely from the difficulty.<sup>98</sup>

(3) If you should believe from a preponderance of the evidence herein that the defendant S was negligent in one or more respects as charged in the complaint, and that through no fault of the plaintiff or her husband, the plaintiff and her husband were confronted with sudden peril caused by the conduct of the defendant, and by reason thereof their judgment was clouded and they did not do just as they might have done had their judgment not been so clouded, they can not be held responsible in such circumstances for a mere error in judgment, if any, even though they did the wrong thing in trying to save themselves and avoid accidents.<sup>99</sup>

**Pennsylvania.**

(1) Where one is confronted by a sudden emergency, so that one does not have the opportunity to act with the judgment that one ordinarily may exercise, one is held in law only to exercise his best judgment under the circumstances. If you believe, therefore, that this accident was caused by the natural, impulsive act, not negligence, of the driver of the truck in seeking to avoid an imminent danger that was suddenly thrust upon him, and that he used his best judgment, there would be no negligence and your verdict would be in favor of the defendant.<sup>1</sup>

(2) If, at the time of the accident, the plaintiff was exercising proper care in passing along the highway, and the defendant negligently managed his machine so as suddenly to imperil the safety of the plaintiff, the latter would not be guilty of negligence if, while exercising the caution of a prudent man, his bicycle struck the curb when he was attempting to escape the peril. In that case the proximate cause of the accident would not be the act of the plaintiff in riding his bicycle against the curb, but the negligence of the defendant which endangered the plaintiff's safety. If the plaintiff would have been struck and injured by the defendant's machine had he not deflected from the straight course along the highway as a means of escaping from impending danger, he would not necessarily be guilty of negligence if, in attempting to escape the danger, he did not exercise the care or judgment required of him if it had been his voluntary action. All that was required of him to protect himself from the anticipated danger was to

<sup>98</sup> *Weinstein v Wheeler*, 135 Or P 809  
518, 295 P 196, 296 P 1079

<sup>1</sup> *Casey v Siciliano*, 310 Pa 238,

<sup>99</sup> *Noble v Sears*, 122 Or 162, 257 165 A 1

use the care of an ordinarily prudent man, under all the circumstances, and, if he did so, he could not be charged with negligence. When a person has been put in sudden peril by the negligent act of another, and, in an instinctive effort to escape from that peril, falls upon another peril, it is immaterial whether under different circumstances he might and ought to have seen and avoided the latter danger.<sup>2</sup>

#### South Carolina

(1) Where a person is brought face to face with imminent danger on account of the negligence of another and without fault on his part, such person is not required in such emergency to exercise the same degree of care as if he had time for deliberation and the full exercise of his judgment and reasoning faculties, but he is only required to exercise such judgment as a person of ordinary reason and prudence would exercise under similar extraordinary circumstances.<sup>3</sup>

(2) Where a person is suddenly confronted with a dangerous situation, where he is not in fault in bringing about that situation, he must do his best to avoid harming any one, but it is not like looking at the situation when no peril exists and having time to figure it out and see the course by which it could be avoided, but you must take into consideration the time, the emergency and the need of quick decision. A person, though, who brings about the perilous situation through his own negligence would not avoid liability for injury on the ground that his act was done in stress of emergency, but if he didn't bring about the perilous situation, then his acts under stress of emergency, as I stated to you, would not be held as strictly accountable as if an emergency or perilous situation had not existed.<sup>4</sup>

#### Tennessee

If the defendant L suddenly drove his car upon the highway immediately in front of C's car, while he, C, was driving along the highway exercising ordinary care and prudence, so as to create a sudden emergency, then it was C's duty to exercise ordinary care under the circumstances to avoid a collision and injury and if he did so upon that occasion, then he would not be liable though it may appear now that a different course on his part would have been a better and safer course. But, of course, this principle of law would have no application if the sudden emergency was brought about by the negligence

<sup>2</sup> Wright v Mitchell, 252 Pa 325, 141 SC 238, 139 SE 459  
97 A 478

<sup>4</sup> Southern v Cudahy Packing Co.,

<sup>3</sup> Brogdon v Northwestern R Co, 160 SC 496, 159 SE 32

of C., and if it was so brought about, you would determine the issues in the case under the law as explained in the other parts of this charge.<sup>5</sup>

#### Texas

No person will be held responsible for his acts or omissions which occur when, through no fault of his own, his mind is in such a state of fright or terror as to render him incapable of acting with ordinary care and prudence.<sup>6</sup>

#### Virginia

The court further instructs the jury, that if they believe from all of the evidence in this case, that defendant's truck driver, N, without fault on his part, and in an effort to avoid a collision with the car driven by D, drove to the left side of the center of the highway because of a sudden emergency created by D, and that N acted as a person of ordinary prudence might have acted under the same circumstances, then in so doing, N. was not guilty of any negligence even though his choice of action was not the wisest course and actually caused the accident and injuries to D, and you cannot find a verdict in her favor.<sup>7</sup>

#### Washington

(1) A person in imminent peril is not required by law to exercise the same presence of mind and degree of care which an ordinarily prudent man would have exercised under ordinary circumstances, that is, where a person is called upon to act in an emergency and takes what appears to be the safest course to avoid a discovered danger, he is not necessarily guilty of negligence, even though he did not use the best judgment, and I therefore instruct you that in this case if the plaintiff, the driver of the car, without fault, was suddenly brought into a position where he saw that a collision was likely to occur, that he would not be guilty of negligence in speeding up his car or veering to the right, even though it should subsequently appear not to have been the wisest course to take.<sup>8</sup>

(2) If you should determine from the evidence that the defendants were lawfully upon and proceeding along the highway at the time when the driver, R. H., first observed the deceased, and that the position of the defendants thus created was one of peril or sudden emergency, then I instruct you that

<sup>5</sup> Caldwell v Hodges, 18 TennApp 355, 77 SW2d 817

<sup>6</sup> Hooks v Orton (TexCivApp), 30 SW2d 681

<sup>7</sup> Daniels v C I Whitten Transfer Co, 196 Va 537, 84 SE2d 528

<sup>8</sup> Hook v. Kirby, 175 Wash 352, 27 P2d 567

the law does not hold defendants to responsibility in the same degree for sound judgment and proper action as under other circumstances. The fact that the driver had to act suddenly in an emergency and without opportunity for deliberation is a circumstance to be taken into consideration in determining what is ordinary care in that situation.

If, on the other hand, you find from a fair preponderance of the evidence that the defendants were wrongfully occupying their location on the public highway at the time said driver first observed the deceased, then said defendants are not relieved from exercising the same degree of care and prudence that is ordinarily required had no peril of sudden emergency presented itself.<sup>9</sup>

#### Wisconsin

(1) Any person who, by the negligence of another, and not by his own negligence, is suddenly placed in an emergency or circumstances of danger, either to himself or to others, or to both, and is compelled thereby to act instantly in order to avoid injury, is not guilty of a lack of ordinary care if in such circumstances he makes such choice and takes such course as a person of ordinary prudence might take on the instant, even though it should turn out not to have been the best or safest course. That means that when a person, by some other person's negligence, is placed in a position of sudden danger and required to act instantly, that person may act differently from the way he or she might have acted if there had been opportunity to think and consider.<sup>10</sup>

(2) Any person who, without negligence on his part, is suddenly placed in an emergency or circumstances of danger, either to himself or to others, or to both, and is compelled thereby to act instantly in order to avoid injury, is not guilty of negligence if, in such circumstances, he makes such choice and takes such course as a person of ordinary prudence might reasonably take on the instant, even though it should turn out not to have been the best or the safest course, and this applies even though the course taken be in violation of some rule of the road. Every traveler on the highway has a right to assume that every other traveler will obey the rules of the road and will not negligently expose himself to or put others in danger, and he may continue in that assumption until it becomes, or ought to be apparent to him, that some other traveler is by

<sup>9</sup> *Simonson v Huff*, 124 Wash 549, 215 P 49

*Vilas County, Wisconsin*, see 192 Wis 197, 212 NW 257

<sup>10</sup> *Dormeyer v Hall*, Circuit Court,

wrongful conduct creating dangers or is either unaware of or can not avoid the danger. When such a situation becomes apparent, then each traveler must, in order to be free from negligence, make all reasonable efforts to avoid collision or injury, even though the other traveler is in the wrong in his course of conduct.<sup>11</sup>

(3) Collisions may happen when neither party can be said to be negligent, and in such case the driver of the automobile is not responsible. He is, furthermore, not required to anticipate that the deceased would wear a garment which would be blown across his path, as the defendant claims was the deceased's poncho. The law, furthermore, does not require a supernatural poise or self-control on the part of an automobile driver, and, if some unforeseen emergency occurs which naturally would overpower the judgment of an ordinarily careful driver so that momentarily, he is not capable of intelligent action, he may not be negligent. Whether such was the situation in this case is a matter that you must decide and answer.<sup>12</sup>

### § 344. Speed and control generally.

#### Federal

##### District of Columbia

The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant drove recklessly and at a rate of speed which was greater than reasonable and proper, having regard to the width, traffic, and use of the highway, immediately preceding the happening of the accident. Further, the burden is on the plaintiff to prove that any such act was the proximate cause of the accident, and should you find as a matter of fact that the defendant did not drive recklessly and at such a rate of speed or that such driving, even though it was reckless and at an excessive rate of speed, was not the proximate cause of the accident, then your verdict should be for the defendant.<sup>13</sup>

#### Alabama.

I charge you if you are reasonably satisfied from the evidence that defendant was driving at a rate of speed greater than allowed by law, he is guilty of negligence.<sup>14</sup>

<sup>11</sup> *Blown v Haertel*, Circuit Court, Marathon County, Wisconsin, see 210 Wis 345, 352, 354, 244 NW 630, 633, 246 NW 691.

<sup>12</sup> *Siegl v Watson*, 181 Wis 619, 195 NW 867.

<sup>13</sup> *Paxson v Davis*, 62 AppDC 146, 65 F2d 492.

<sup>14</sup> *Ashley v McMurray*, 222 Ala 32, 130 S 401. See also *Saunders System Birmingham Co v Adams*, 217 Ala 621, 117 S 72, 61 ALR 1333.

## Arkansas

(1) Ordinary care requires of every man who drives a motor vehicle upon a public street to keep a lookout for vehicles or persons who may be upon the street, and to keep his motor vehicle under such control as to be able to check the speed or stop it absolutely, if necessary, to avoid injury to others when danger may be expected or is apparent. <sup>15</sup>

(2) You are instructed that it is the duty of a person operating an automobile upon a public highway to drive the same with due care and circumspection, and at a careful and prudent speed, not greater than is reasonable and proper, having due regard to the traffic and safety of others and he has no right to drive at such speed or in such manner as to endanger the life, limb, or property of any person <sup>16</sup>

## California

(1) It is incumbent upon the driver of an automobile to keep control of his automobile at all times, and to use reasonable care and caution under the circumstances and conditions of the particular time <sup>17</sup>

(2) A person may not shield himself against a charge of negligence merely by showing that an automobile operated by him was temporarily beyond his control due to its skidding, if the skidding was the direct result of his own negligence <sup>18</sup>

(3) Although an automobile may be traveling at a rate of speed prohibited by law, unless the excessive speed of the car is the proximate cause of the injury complained of, the operator is not liable <sup>19</sup>

(4) You are instructed that it is a part of the duty of the operator of a motor vehicle to keep his machine always under control, so as to avoid collisions with other cars and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times, he must be vigilant and must anticipate and expect the presence of others. Accordingly, the fact that he did not know that any one was on the highway, is no excuse for the conduct, which would have amounted to recklessness, if he had known that another vehicle or person was on the highway <sup>20</sup>

<sup>15</sup> Smith Arkansas Traveler Co v Simmons, 181 Ark 1024, 28 SW2d 1052

<sup>16</sup> Jacks v Culpepper, 183 Ark 505, 37 SW2d 94

<sup>17</sup> White v Davis, 103 CalApp 531, 284 P 1086

<sup>18</sup> Musante v Guerrini, 125 Cal App 556, 13 P2d 965

<sup>19</sup> Silveira v Siegfried, 135 Cal App 218, 26 P2d 666

<sup>20</sup> Johnson v Johnson, 137 Cal App 701, 31 P2d 237



(5) Even though the operator of an automobile may be rigidly within the law, he still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires, he must slow up or stop <sup>21</sup>

(6) It is the duty of the driver of a motor vehicle, using a public highway, to be vigilant at all times and to keep the vehicle under such control that, to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position <sup>22</sup>

#### Connecticut

(1) An automobile is a dangerous instrumentality of traffic. By reason of its great weight, speed, power, and momentum, a collision with an automobile will ordinarily be more serious and disastrous in its results than collisions between persons or other vehicles. It is because of this danger and the results which are likely to follow from the collision with an automobile that reasonable care in its operation means great care. For it is only by such great care that such a vehicle can be reasonably and safely operated upon the highway. Hence, it necessarily follows that the driving of an automobile at a high rate of speed through the streets of a town or across bridges at a time, and in a place where there are other vehicles passing or attempting to pass or other automobiles going in the same or opposite directions would be negligence. The legal duty of one operating a motor vehicle is to operate it only at such speed as will enable him to timely stop it to avoid a collision either with another vehicle or a pedestrian. It is therefore one's duty to have complete control of the car he is driving <sup>23</sup>

(2) No matter how great the rate of speed allowed by law, the operator remains bound to anticipate that he may meet persons or vehicles on a public street, and he must keep his machine under such control as will enable him to avoid a collision <sup>24</sup>

#### Georgia

I further charge you, gentlemen, that under the law of this state, no person shall drive a vehicle on a street or highway at

<sup>21</sup> *Rush v. Lagomarsino*, 196 Cal 308, 237 P 1066

<sup>22</sup> *Chadek v. Spira*, 146 CalApp 2d 360, 303 P2d 879

<sup>23</sup> *Doerr v. Woodland Transp. Co.*,

105 Conn 689, 136 A 693. See also *Pietrycka v. Simolan*, 102 Conn 42, 127 A 717

<sup>24</sup> *Irwin v. Judge*, 81 Conn 492, 71 A 572

a speed greater than is reasonable or prudent under the conditions and having a regard to the actual or potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on the highway in compliance with the legal requirements and the duty of all persons to use due care.

I charge you further that the driver of every vehicle shall, when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, drive at an appropriate or reduced speed so as to avoid colliding with other vehicles or pedestrians using the highway.<sup>25</sup>

#### Illinois

The court instructs the jury that even if they should believe from the evidence that the defendant was not, at the time of the injury complained of, driving at an unusual rate of speed, still, if they further believe from the evidence that the defendants did commit the injury upon the plaintiff, as charged in the declaration, while she was using due and proper care, and the defendants might, by using ordinary and proper care at the time, have avoided committing such injury, and that in consequence of a want of such reasonable and ordinary care on the part of the defendants the plaintiff received the injuries complained of, then the jury should find the defendants guilty and assess the plaintiff's damages at such sum as they may think, from the testimony, will compensate her for the injuries so sustained by her, not to exceed the amount claimed in the declaration.<sup>26</sup>

#### Indiana

Whether an automobile is driven at an unlawful rate of speed depends upon the surrounding circumstances. The law recognizes that a higher rate of speed is permissible in the open, sparsely settled portions of a city, or town, or in the open country, than in the closely built up portions of a city or town. It is a question in each instance as to whether the speed of the vehicle in question can be said to be unreasonable or imprudent, at the time and place, and taking into consideration the number of vehicles on the highway at the time, the likelihood of collision with others rightfully upon the highway at the time, the character of the surrounding territory, as to whether it is thickly populated or otherwise, the time of day or night in which he was driving, the condition of the weather as to whether it was misty, foggy or otherwise, the facilities open to him to avoid colliding

<sup>25</sup> Puckett v. Kelly, 96 GaApp 225, 99 SE2d 691

<sup>26</sup> Schmidt v. Sinnott, 103 Ill 160

with others rightfully upon such highway, and all the surrounding facts as shown from the evidence, which will aid you as reasonable men in determining whether or not the speed is or is not reasonable and prudent, having regard to the traffic and use of the highway, and so as not to endanger the life and limb and property of others on such highway <sup>27</sup>

#### Iowa

(1) On the other hand, if the driver was not driving at a greater rate of speed than an ordinarily careful and prudent person would drive a motor vehicle under the same or similar circumstances, or was not driving at a speed greater than would permit him to bring it to a stop within the assured clear distance ahead, he would not be guilty of negligence in respect to speed. <sup>28</sup>

(2) In operating an automobile it is the duty of the driver to exercise reasonable and ordinary care in respect to the speed and management of the said vehicle that he may have it under such control as to be able to handle properly and control the same, and, in the exercise of ordinary care, he should be able to stop it with reasonable celerity at any time or place to avoid danger and injury to the person or property of another <sup>29</sup>

#### Kansas.

Though it should be found that the defendant was driving at a low rate of speed, still he was bound to use due and ordinary care to avoid collisions or to avoid injury to others, failure to do which would render him liable, in the absence of contributory negligence <sup>30</sup>

#### Kentucky

(1) Defendant was required to have his automobile under reasonable control, operate it at a rate of speed that was reasonable and proper, having regard for the traffic conditions and the use of the highway at that time and place, and to keep a lookout ahead for persons or other vehicles in front of him or so near thereto as to be in danger of collision <sup>31</sup>

(2) If you believe from the evidence that the plaintiff appeared suddenly in front of defendant's truck or so near thereto that danger to him should have been anticipated, and that, if

<sup>27</sup> United States Nat Bank v Davis, Superior Court, Lake County, Indiana, No 2573

<sup>28</sup> Engle v Nelson, 220 Ia 771, 263 NW 505 See also Danner v Cooper, 215 Ia 1354, 246 NW 223

<sup>29</sup> Shutes v Weeks, 220 Ia 616,

262 NW 518 See also Collinson v Cutter, 186 Ia 276, 170 NW 420

<sup>30</sup> Coughlin v Layton, 104 Kan 752 180 P 805

<sup>31</sup> Lieberman v McLaughlin, 233 Ky 763, 26 SW2d 753

defendant had been running at a reasonable rate of speed, he, with the means at his command, in the exercise of ordinary care, could not then have prevented the collision, your finding should be for the defendant <sup>32</sup>

Michigan

(1) The duty to keep an automobile under control involves the ability to stop promptly within a reasonable distance. This duty does not extend so far as to require that it must always be possible to bring an automobile to an immediate stop upon the sudden arising of a dangerous situation which the driver could not reasonably have anticipated <sup>33</sup>

(2) It [assured clear distance ahead] means that a man must drive at such a rate of speed that within his vision he can see objects that are ahead of him in such a way that he can bring his car to a stop before he hits those objects. That is the rule of law as to the assured clear distance ahead, and the obstacle in the road ahead of a driver can be another automobile going in the same direction that he goes. That rule as to the assured clear distance ahead does not mean that a driver on the road can never catch up to and pass from the rear a car ahead of him. He has that right to catch up with a car ahead of him. He has that right to catch up with a car ahead of him, and he has the right to pass that car under the rules that are laid down in the law. But the rule of assured clear distance ahead means the distance between the driver and an obstacle on the road in front of him. The rule as to assured clear distance ahead never comes into being until there is a visible object on the road in front of the driver. There never was an opportunity in this case for the rule of assured clear distance ahead to come into being until this plaintiff drove her car out upon the road in front of the defendant. The sudden emergency created by somebody coming out upon the road ahead of you is not a case which involves the rule of assured clear distance ahead at all. It is a rule which involves another duty, and a quite different duty. The duty that was imposed upon him under those circumstances was to see her as soon as a reasonably prudent man would have seen her, and to stop his car and prevent a rear-end collision if a person of reasonable prudence could and would have stopped his car and avoided a collision. But the plaintiff must prove that the circumstances were such that an ordinarily prudent person would have seen her in time so that by the exercise of that ordinary prudence he could and would have stopped before he

<sup>32</sup> *Golubic v Rasnick*, 239 Ky 355,  
39 SW2d 513

<sup>33</sup> *Leplev v Bryant*, 336 Mich 224,  
57 NW2d 507

hit her. And if the plaintiff has not proved by fair preponderance of the evidence that such reasonable person exercising such reasonable care could and would have seen her after the time when she got into the highway, and up to the time when the collision took place, and would have stopped and have prevented a collision, then the evidence does not warrant a finding that this defendant was guilty of negligence on his part in the way he handled himself and his car after she got out into the road in front of him. I again suggest for your reasonable consideration that the time was short between the time when she got upon the road and the time when the collision took place, not measured in minutes, not measured in half-minutes, but measured in seconds. It could have been 10 seconds. It could have been 15 seconds. This is something for you to determine. But the duty of the defendant to see the plaintiff and bring his car to a stop before running into the rear end of her car did not arise until she got out on the road and until a reasonably prudent person would have seen her, and it could only have been performed in the prevention of an accident if a reasonable person, after having made that discovery, could and would have stopped without touching her car. Those are the only two grounds upon which plaintiff claims actionable negligence in this case. You conclude that the defendant was actionably negligent if you find he was going unreasonably fast, or if you find that after he discovered her on the road, that he did not do what a reasonably prudent man would have done under all the circumstances.<sup>34</sup>

#### Mississippi

The court instructs the jury for the plaintiff that the driver of a vehicle must not merely drive such vehicle so as to be able to stop within the range of his or her vision, but the driver must so drive said vehicle that he or she can actually discover an object, perform the manual acts necessary to stop, and bring such vehicle to a complete halt, if necessary, to avoid collision with others on or near the highways, and if you believe from a preponderance of the evidence in this case that defendant was not driving said vehicle so as to be able to avoid such a collision, then and in that event, defendant was negligent, and if you further believe from a preponderance of the evidence that such negligence, if any, proximately contributed to the happening of the accident, giving rise to the plaintiff's damages, it is your sworn duty to find for the plaintiff.<sup>35</sup>

<sup>34</sup> *Barner v. Kish*, 341 Mich 501, 67 NW2d 693

<sup>35</sup> *Hamilton v. McCry*, 229 Miss 481, 91 S2d 564

**Missouri**

(1) The degree of care which one is required to exercise at a given moment in the operation of his automobile is to be measured by the obligations of the situation which confronts him, and thus a speed which would be free from the imputation of negligence under some circumstances might easily be regarded as a very negligent and unsafe speed under other and different circumstances <sup>36</sup>

(2) And, if you further find from the evidence that the defendant negligently, that is, by failing to exercise the highest degree of care, caused and suffered his said automobile to run at a high, excessive and dangerous rate of speed under the circumstances, if you so find, and that by reason thereof, the defendant's automobile collided with the automobile that was being driven by the plaintiff and that plaintiff was injured as a result thereof, your verdict should be for plaintiff <sup>37</sup>

**Montana.**

In this state the operator must drive his automobile in a reasonably prudent and careful manner, and at a rate of speed no greater than is reasonable and proper under the circumstances existing at the point of operation, taking into account amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property or other rights of any person entitled to the use of the highway <sup>38</sup>

**New Jersey**

(1) It is the duty of the driver of an automobile to use reasonable care to avoid injuries to others and it is a breach of that duty to fail to stop the vehicle or slacken its speed, when that is the only way in which injury to others can be avoided <sup>39</sup>

(2) Any speed which interferes with the free use of the road by other persons, or in any manner endangers the life or limb or the property of any person is reckless <sup>40</sup>

**North Carolina**

It was his duty in the operation of the motor truck upon the

<sup>36</sup> Bramblett v Harlow (MoApp), 75 SW2d 626 See also Cummings v Holly (MoApp), 60 SW2d 52

<sup>37</sup> Niehaus v Schultheis (Mo App), 17 SW2d 603 See also Smith v Star Cab Co., 323 Mo 441, 19 SW2d 467, Sapp v Hunter, 134 MoApp 685, 115 SW 463, Brooks v Harris (MoApp), 207 SW 293,

Buck v Thatcher, 222 MoApp 1036, 7 SW2d 398

<sup>38</sup> Pierce v Safeway Stores, Inc., 93 Mont 560, 20 P2d 253

<sup>39</sup> Eastmond v Wachstein, 4 NJ MiscR 966, 135 A 67

<sup>40</sup> Kemp v Bright, 104 NJL 529, 141 A 796 See also Iannicelli v Benvenga, 99 NJL 506, 123 A 882

street to operate the same with due care and prudence for his own safety. It was his duty not to operate it at a greater rate of speed than — miles per hour, or than was reasonable and proper, considering the traffic, width, surface and other conditions then existing, which he knew, or in the exercise of due care could ascertain <sup>41</sup>

#### North Dakota

One must, in driving an automobile, be governed by the present conditions of everything, the road and all other matters as I said before, and the rate of speed must be graduated to the time and conditions, and if the time and conditions, taking into consideration light and darkness, and all other matters are such, that a low rate of speed is the safe and prudent rate of speed, one must be particularly vigilant in looking ahead and watching the road over which he is traveling, because if the condition and the time is such as to warn an ordinarily prudent man to drive at a slow rate of speed, rather than a lively rate of speed, or a rapid rate of speed, that is a warning that conditions are such that it is not safe to drive a car at such a rate of speed that it could not be easily stopped or controlled. These are facts that must be taken into consideration by you in determining upon your verdict. <sup>42</sup>

#### Ohio

(1) If you find by a preponderance of the evidence that the assured clear distance ahead of the automobile of the defendant, C, was suddenly cut down and lessened, without his fault, by the entrance within such clear distance and into his path and line of travel of the automobile of the defendant, L P, which rendered the defendant, C, unable, in the exercise of ordinary care, to avoid colliding with the automobile of L P, there was no violation on the part of the defendant, C, of the rule of law which prohibits the operation of a motor vehicle at a greater speed than will permit it to be brought to a stop within the assured clear distance ahead <sup>43</sup>

(2) Likewise there was a law of the state of Ohio in force, commonly known as the assured clear distance. That is, one must so control, and operate his automobile that he may bring the automobile to a stop within the assured clear distance ahead; that is, any discernible object being in his path, he must so control and operate the automobile so that it can be brought

<sup>41</sup> Alexander v Southern Public Utilities Co, 207 NC 438, 177 SE 427

<sup>43</sup> Galliher v Campbell (OhApp), 12 NE2d 758

<sup>42</sup> Billingsley v McCormick

to a stop within the assured clear distance That law was in full force and effect, and I say to you that the driver of the car in which plaintiff was riding violated that law and was guilty of negligence <sup>44</sup>

#### Oklahoma

You are instructed that it is the duty of an operator of a motor vehicle while driving upon the highway to keep his automobile always under control, so as to avoid collisions with persons using the highway <sup>45</sup>

#### Oregon.

(1) The law requires an automobile to be always under control of the driver, and to proceed at such speed as is reasonably safe under the circumstances, which depends largely upon the amount of the traffic, the condition of the road, its width, alignment, and other circumstances <sup>46</sup>

(2) It was the duty of the defendants to drive their automobile in a careful and prudent manner and at a speed not greater than is reasonable and proper and no person is permitted to drive an automobile at such a speed as to endanger the life, limb or property of any person, and if defendants failed to comply with this rule of law, they were negligent and if this was the proximate cause of plaintiff's injuries and plaintiff was not negligent, then your verdict should be for the plaintiff <sup>47</sup>

#### Pennsylvania.

(1) It is the duty of the driver to keep a constant lookout and to keep his car under such control as to avoid accidents incident to its ordinary operation, and to such unexpected dangers as might have been avoided by the exercise of due care <sup>48</sup>

(2) The test of control is the ability to stop quickly and easily When this result is not accomplished, the inference is obvious that the car was running too fast, or that proper effort to control it was not made <sup>49</sup>

#### Texas

The court instructs the jury that even though you may believe from the evidence that at and just prior to the collision

<sup>44</sup> Schreiber v Nat Smelting Co, 521 157 OhSt 1, 104 NE2d 4

<sup>45</sup> Cushing Ref & Gasoline Co v Deshan, 149 Okl 225, 300 P 312

<sup>46</sup> Goebel v Vaught, 126 Or 332, 269 P 491 See also McCallister v Farra, 117 Or 278, 243 P 785, Archer v Gage, 126 Or 532, 270 P

<sup>47</sup> Snabel v Barber, 137 Or 88, 300 P 331

<sup>48</sup> Silberstein v Showell, Fryer & Co, 267 Pa 298, 109 A 701

<sup>49</sup> Weinberg v Pavitt, 304 Pa 312, 155 A 867



complained of the plaintiff was running his automobile at an excessive rate of speed and in excess of the speed permitted by the ordinances of the city of El Paso for said place, and that plaintiff was negligent in so doing, if he did so, but if you further find from the evidence that the speed at which plaintiff was running his automobile did not proximately cause or contribute to cause the collision and consequent injuries, if any, to plaintiff and his automobile, then in such event, you are instructed that you can not find against the plaintiff on the ground of his running the automobile at an excessive rate of speed or in excess of the speed limit at such place, if he did so <sup>50</sup>

#### Utah

The speed at which one may drive and not be guilty of negligence depends on surrounding circumstances at the time, having regard to the width, grade, and condition of the street, nature of the street and nature of the traffic, and the time at which the driving is attempted <sup>51</sup>

#### Vermont

Something has been said in argument about the meaning of the term "keeping an automobile under proper control" The speed of a vehicle is the critical element in determining whether or not the vehicle is under proper control The speed must be reasonable under the existing circumstances The test of control is their ability to stop as quickly and easily as the circumstances may reasonably be expected to require, and when this result is not accomplished, the inference is obvious that the car was running too fast, or that proper effort to control it was not made by the driver <sup>52</sup>

#### Virginia

The court instructs the jury that it was the duty of the defendant, Miss T, while driving her automobile along Broad Street on the day of the alleged accident, to use ordinary care: First, to keep the said car at all times under reasonable control by the use of the steering wheel and brakes with which the same was equipped, second, to observe and obey the provisions of such traffic ordinances as the evidence shows were then in force in the city of Richmond, regulating the rate of speed of automobiles, and other like vehicles on Broad Street, and regulating the manner in which parties driving such vehicles and going in the same direction should pass each other

<sup>50</sup> Texas & P R Co v Hilgartner P2d 224  
(TexCivApp), 149 SW 1091

<sup>52</sup> Emerson v Hickens, 105 Vt  
197, 164 A 381.

<sup>51</sup> Balle v Smith, 81 Utah 179, 17

And if the jury believe from the evidence that the said defendant, Miss T, failed to use ordinary care to perform any one or all of the foregoing duties, and that by reason thereof the car which she was driving left the driveway of said street, and ran partially or wholly upon the sidewalk, and struck and killed the decedent, J F. O, while he was either standing or walking on said sidewalk, then the defendant was guilty of negligence, and if the jury further believe from the evidence that such negligence was the proximate cause of the death of the decedent, they must find for the plaintiff.<sup>53</sup>

#### Washington

(1) You are instructed that the excessive speed of a car, if any, is not the proximate cause of damage if the driver of such car was where he had a right to be and the driver would not have had sufficient time to avoid the collision, had he been driving at a lawful speed<sup>54</sup>

(2) You are instructed that it is the duty of an operator of a motor vehicle to operate such vehicle at all times at such reasonable rate of speed and in such a manner that it can be stopped within a reasonable distance before striking objects in front<sup>55</sup>

(3) If Mrs G was not driving her automobile in a careful and prudent manner, or even though she was driving at a rate of speed less than — miles an hour, she was driving at a rate of speed greater than was reasonable and proper under conditions existing at the time, or was driving at a rate of speed such as would unduly or unreasonably endanger the life, limb, or property of other persons, she would be guilty of negligence<sup>56</sup>

#### Wisconsin

Every operator is bound to use his senses and faculties in a manner commensurate with the danger and is bound to anticipate that he may meet persons or vehicles at any point, and he must keep his machine under such control as will enable him to avoid collision with any other person or vehicle traveling upon the highway with ordinary care and caution. On meeting another vehicle he must keep to his own right side of the road and must slow down, and even stop, if the circumstances at the time require the same in order to avoid a collision<sup>57</sup>

<sup>53</sup> *Trauerman v Oliver's Admr*, 125 Va 458, 99 SE 647

<sup>54</sup> *Bailey v Carver*, 51 Wash2d 416, 319 P2d 821

See also *Curtis v Perry*, 171 Wash 542, 18 P2d 840

<sup>55</sup> *Jacklin v North Coast Transp*

*Co*, 165 Wash 236, 5 P2d 325

<sup>56</sup> *Gaches v Daw*, 168 Wash 162, 10 P2d 1111

<sup>57</sup> *Gilbert v Popp*, Circuit Court, Marathon County, Wisconsin, see 204 Wis 622, 235 NW 680

§ 345. (Reserved).

§ 346. — Visibility limited or view obstructed; curves and hills.

Arizona

(1) When the driver of an automobile is blinded by the lights of another car, it is his duty to bring his car to such control that he can stop immediately, and if he can not then see, he must stop; and if you find from a preponderance of the evidence that plaintiff's failure under the circumstances to stop or have control of his car contributed to the accident, you should return a verdict for defendant <sup>58</sup>

(2) The fact that travel on the highway, when the vision is poor or obscured by reason of dust in the air and the glare of headlights, is attended with danger, is an admonition to the driver as well as the pedestrian to proceed with greater caution and care than if these conditions did not exist.

If a driver can not see where he is going, he should stop. If his vision is limited, he should have such control of his car as to be able to stop within the radius of his vision.

A driver must, on peril of legal negligence, drive in such a manner as to be able to bring his car to a complete halt within the range of his vision <sup>59</sup>

California.

When the vision of the driver of an automobile is obscured by a hill or swale so that he has no clear or unobstructed view of the highway, the speed of his automobile should be regulated in the same manner as though his view was obstructed by any other obstacle.

The driver of an automobile should reasonably regulate the operation of his vehicle in accordance with surrounding conditions so as to avoid accidents, when a clear and unobstructed view is not afforded <sup>60</sup>

Connecticut

(1) It therefore became his duty, as he approached this curve at the top of this steep hill, to sound his horn, slacken his speed, and have his car under proper control <sup>61</sup>

<sup>58</sup> Dennis v Stuke, 37 Ariz 299, 294 P 276 [reh den 37 Ariz 510, 295 P 971]

<sup>59</sup> Coe v Hough, 42 Ariz 293, 25 P2d 547

<sup>60</sup> Fleming v Flick, 140 CalApp 14, 35 P2d 210

<sup>61</sup> Andrews v Dougherty, 96 Conn 40, 112 A 700

(2) Upon approaching an intersecting highway, a curve or a corner of a highway, or a schoolhouse, provided signs on the highway legible for a distance of 100 feet indicate such highway, curve, corner, or schoolhouse, any person operating a motor vehicle shall reduce its speed and give a timely signal when reasonable care would require it. While it has not appeared in evidence, that I now recall, that there were signs at this point indicating this curve, yet in view of S's familiarity with it—which is all that the signs are designed to provide for—the requirements above set forth would no doubt apply in his case <sup>62</sup>

**Indiana.**

If it should appear from the evidence that there was not sufficient light to render vehicles, persons, or other substantial objects on the highway clearly visible for 150 feet, then it was the duty of plaintiff to have the headlights on his car, if he was operating it on the street in question, so constructed that the light ahead would reveal clearly any person, vehicle, or other substantial objects for such a distance. If his headlights at the time of the accident were dim and did not show objects 150 feet ahead, it then became his duty, under the law, to reduce his rate of speed to a rate that would enable him to stop or avoid colliding with such obstructions in such a distance as was within the range of his vision, and unless he shows that he was operating his car at a rate of speed that enabled him to stop or avoid such obstructions in the distance he could see at the time of the accident, by the exercise of reasonable and ordinary care, then he can not recover herein if such failure proximately contributed to the injuries complained of <sup>63</sup>

**Michigan**

(1) A rate of speed on a through highway of 45 or more miles per hour is not illegal nor excessive nor uncommon. It is quite ordinary. A driver desiring to cross such road must anticipate fast traffic on it, and, when the range of his vision is limited, he can not always assume that a single observation will disclose the situation and all of its probabilities and proceed as though there were no cars on the road within colliding distance. On the other hand, he may assume that a driver on the through highway, coming into the range of vision, will discover him seasonably and take ordinary care to avoid collision <sup>64</sup>

<sup>62</sup> Andrews v Dougherty, 96 19928 see 197 Ind 475, 151 NE 390  
Conn 40, 112 A 700 <sup>64</sup> Adams v Canfield, 263 Mich

<sup>63</sup> Koplovitz v Jensen, Superior 666, 248 NW 800  
Court, Lake County, Indiana, No

(2) As I shall try to show to you presently, every man must operate his automobile so that he can stop it within the range of his vision, whether it be daylight or darkness. It makes no difference what may obscure his vision, whether it be a brick wall or the darkness of nightfall. He can't see, he can't operate. He must be able to see where he is going. As I said to you a moment ago, there are other duties imposed on motorists by well-settled law of this country, of this state. One is, that the operator of an automobile must keep a proper lookout ahead. He must see that which is there to be seen in the path of his automobile. He must keep his automobile under control. He must be able to stop within the range of his vision, whether that vision be obscured by obstacles or buildings in daylight or by darkness at night. No man may be permitted to operate an automobile with its weight, power and speed in darkness, if he can't see, he must stop. He must, as I said to you a moment ago, be able to see where he is going, and if his range of vision is 50 feet, if he can see 50 feet ahead of him, he must regulate his speed so that he can stop in a distance of 50 feet, if he can see 20 feet ahead of him, he must regulate his speed so that he can stop within 20 feet, and so on.

It is well settled that it is negligence, as a matter of law, to drive an automobile along a public highway in the dark at such speed that it can not be stopped within the distance that objects can be seen ahead of it.<sup>65</sup>

#### Nebraska

In determining the degree of negligence of the defendant you should consider the visibility of plaintiff and his car and whether or not the lights on the rear of the car plaintiff had driven were lighted and all other facts and circumstances in evidence affecting the car's visibility, what the defendant could and should have been able to see and do in the exercise of ordinary care, the speed at which he was traveling, and all other facts and circumstances relating to these subjects.<sup>66</sup>

#### Pennsylvania

It is negligence to drive an automobile at a very rapid rate at night without lights necessary to enable a person crossing the road to see that the automobile is coming and to enable the driver to see ahead and know whether there are persons or vehicles in the road in front of him. The driver of an automobile is held to the degree of care which an ordinarily pru-

<sup>65</sup> Gleason v Lowe, 232 Mich 300, 205 NW 199. See also Ott v Wilson, 216 Mich 499, 185 NW 860.

<sup>66</sup> Fridley v Brush, 161 Neb 318, 73 NW2d 376.

dent person would exercise under the circumstances. The rate of speed should be consistent with reasonable safety and the lights necessary to afford reasonable protection to others on the road should be lit.<sup>67</sup>

#### South Dakota

It is not enough that a driver be able to begin to stop within the range of his vision, or that he use diligence to stop after discerning an object. The rule makes no allowance for delay in action. He must, on peril of legal negligence, so drive that he can and will discover an object, perform the manual acts necessary to stop, and bring the car to a complete halt within such range. If blinded by the lights of another car so he can not see the required distance ahead, he must, within such distance from the point of blinding, bring the car to such control that he can stop immediately, and if he can not then see, shall stop.<sup>68</sup>

#### Tennessee.

The presence of other lights shining upon the place of the accident, as shown in the proof, takes this case out of the rule that a driver at night should drive his car at such a rate of speed that he can stop within the distance that his lights will carry or reveal an object ahead.<sup>69</sup>

#### Utah

You are instructed that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile can not be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him.<sup>70</sup>

#### Washington

(1) In determining whether the defendant, R W, was guilty of negligence at the time the automobile he was then using collided with the automobile of defendant, E D M, you may take into consideration the rate of speed he was then driving such automobile, the manner in which he was operating the same, whether he had proper and reasonable lights thereon to enable him to see objects that might and did come in the path and course he was traveling in time to avoid colliding with and hitting them, and whether he could see objects

<sup>67</sup> Curran v Lorch, 247 Pa 429, 93 A 492

<sup>68</sup> Carlson v Johnke, 57 SD 544, 234 NW 25, 72 ALR 1352

<sup>69</sup> Caldwell v Hodges, 18 Tenn App 355, 77 SW2d 817

<sup>70</sup> Nikoleropoulos v Ramsey, 61 Utah 465, 214 P 304

or obstructions ahead of him on account of any light that might be shining or thrown in his face, and whether he was driving such automobile at a faster rate of speed than he could bring said automobile to a standstill within the distance that he could plainly see objects and obstructions ahead of him, together with all other facts and circumstances shown by the evidence and testimony of this case <sup>71</sup>

(2) Under all of the surrounding circumstances, it was the duty of the driver of the stage to operate it at such speed and have it under such control as that, by exercising reasonable care, he could stop it after he could or should, by the assistance of his headlights, have seen the truck on the road ahead of him <sup>72</sup>

#### West Virginia

The court instructs the jury that under the law, it was the duty of the operator of plaintiff's automobile in approaching the curve where the collision occurred, to have the automobile under control, and to reduce its speed to a reasonable and proper rate, and if the jury believe from the evidence that he did not so operate plaintiff's automobile, then he was negligent, and if the jury further believe from the evidence that such negligence contributed to the injury to plaintiff's automobile, then they should find a verdict for the defendant <sup>73</sup>

#### Wisconsin

(1) Where the view ahead is cut off or is seriously obstructed for any reason, it is the duty of the driver to slow down so as to be able to stop within the distance ahead in which he can clearly see in front of his automobile, or to take such other precautions by giving signals, as an ordinarily prudent operator usually takes under the same or similar circumstances <sup>74</sup>

(2) Independent of statute, when the view of the driver of an automobile is obstructed, whether by reason of a grade or otherwise, the speed of the car should be so reduced that the car can be stopped within the distance the driver can see ahead <sup>75</sup>

<sup>71</sup> Jaquith v Worden, 73 Wash 349, 132 P 33, 48 LRA (N S) 827 See also Fawcett v Manny, 172 Wash 212, 19 P2d 934

<sup>72</sup> Colvin v Auto Interurban Co., 132 Wash 591, 232 P 365

<sup>73</sup> Mercer Funeral Home v Addison Bros & Smith, 111 WV 616,

163 SE 439

<sup>74</sup> Dormeyer v Hall, Circuit Court, Vilas County, Wisconsin, see 192 Wis 197, 212 NW 257 See also Gilmore v Orchard, 177 Wis 149, 187 NW 1005

<sup>75</sup> Swanson v Maryland Casualty Co., 266 Wis 357, 63 NW2d 743

(3) Where the view ahead is cut off or seriously obstructed by fog or smoke or dust, or by ice or snow on the windshield and windows, it is his duty to either stop, or slow down so as to be able to stop, within the distance ahead in which he can see any dangerous object and avoid a collision, or to take such other precautions for safety as an ordinarily prudent operator usually takes under like circumstances. If he fails to do so, he is negligent

An operator has no right to proceed unless he can do so with reasonable safety to himself and all other travelers <sup>76</sup>

(4) It was his duty to keep a careful lookout in the direction in which he was proceeding, and to observe the condition of the roadway and the curve in the road, and to so operate, and restrain the speed of, his car and so maintain control of it that he would not endanger the property, life or limb of any person. If he did not do this, because he was not giving his due attention to the driving of the car and he thereby lost control of his car, and brought about the accident, then you should find that inadvertence and lack of attention of the defendant, and not his lack of skill, produced the overturning of the car. <sup>77</sup>

(5) It appears to have been a foggy night and that vision was thus somewhat, or considerably, obscured. The law requires under such circumstances that the operator of an automobile upon a public highway shall proceed only at such a pace that he or she is able to stop the car within such a distance ahead as the operator can see any obstruction that may be in the way.

One who drives at such a rate of speed that with such opportunity to see ahead as the driver has, the driver can not stop his car within the distance ahead in which the driver can see any substantial object such as another traveler upon the highway, is lacking in ordinary care, or as we sometimes say, is negligent. <sup>78</sup>

### § 347. — Bridges.

#### Arkansas

Operators of motor vehicles upon public highways are required to exercise ordinary care in keeping a lookout for per-

<sup>76</sup> *Lauson v Fond du Lac*, 141 Wis 57, 123 NW 629, 25 LRA (N S) 40, 135 AmStRep 30. See also *Johnson v Prideaux*, 176 Wis 375, 187 NW 207, *Kleist v Cohodas*, 195 Wis 637, 219 NW 366

<sup>77</sup> *Thomas v Steppert*, Circuit Court, Marathon County, Wisconsin, see 200 Wis 388, 228 NW 513

<sup>78</sup> *Knutson v Fenelon*, Circuit Court, Oneida County, Wisconsin, 200 Wis 261, 227 NW 857



sons and vehicles also using the highway. They must keep such motor vehicles under such reasonable control as would enable them to avoid accidents by the exercise of ordinary care where danger is apparent or reasonably anticipated. The degree of care being commensurate with the danger to be anticipated, the traffic to be encountered, and the use of the way. The law provides that no vehicle in overtaking and passing another vehicle or at any other time be driven to the left side of the road-way when approaching within 100 feet of any bridge.<sup>79</sup>

Kentucky.

It was the duty of the operator of the truck at the time and place mentioned in the evidence, to operate it on his right-hand side of the road, giving to plaintiff's automobile the other half of the road as nearly as possible, and when the two vehicles were meeting on the bridge, if the jury believes from the evidence they met each other thereon, to operate it at a speed not greater than 20 miles per hour, and to exercise ordinary care to avoid a collision with plaintiff's automobile.<sup>80</sup>

Ohio

If you find from the evidence that on the date of the accident and prior thereto, certain signs appeared on the highway at the approaches to the bridge, said signs containing warning language "one-lane bridge," that said signs are cautionary in their nature and do not require any specific course of conduct on the part of the motorist, but charge him with the exercise of ordinary care in light of knowledge of the signs together with all other facts and circumstances appearing.<sup>81</sup>

### § 348. — Congested traffic.

It was the duty of both parties at all times to operate their machines with ordinary care and with due regard to other traffic upon the road, and if they saw, or by the exercise of ordinary care could have seen, that the traffic at the point of impact was becoming congested, then it was their duty to slow up or to do such other things as would have been reasonably necessary to a prudent person in order to avoid becoming confronted with danger. If they failed to do this, their failure was negligence.

If the plaintiff was negligent in that respect, and his negligence proximately contributed to the injury, he can not recover;

<sup>79</sup> Nicholas v Bingamon, 219 Ark 237, 43 SW2d 715  
748, 244 SW2d 782

<sup>81</sup> Johnson v Hunter, 166 OhSt

<sup>80</sup> Trevillian v Boswell, 241 Ky 289, 142 NE2d 227

and if the defendant was negligent in that respect, and that negligence proximately contributed to the injury, and the plaintiff was not negligent, then the plaintiff can recover.<sup>82</sup>

**§ 349. — Defects and obstructions in streets and highways; ice and snow.**

**Connecticut**

If you find from the evidence that the defendant was traveling in the exercise of due care in view of existing conditions, with his car properly under control, and if you find that the plaintiff (a pedestrian) after arriving at a point of apparent safety, stepped back, as the defendant claimed she did, into the path of the defendant's automobile, and further find that when the defendant became aware, or ought to have become aware, of her danger, he did all in his power in the time and distance allowed him to save the plaintiff, then the defendant would not be liable

If, however, as the plaintiff claims, and as the plaintiff claims the evidence that she has introduced in the trial of this case fully and abundantly supports, if you find that the defendant was operating his car at a high and dangerous rate of speed having regard to the conditions then confronting him, the condition of the surface of the highway, with the ice and snow and ruts upon it, approaching an intersecting highway, approaching a vehicle that was coming from the intersecting highway on his right, and not having his car under adequate control, and if you find those conditions established by a fair preponderance of evidence, then he was guilty of negligence in the operation of his car, and your verdict should be for the plaintiff, unless you find with reference to all of the facts that the plaintiff, notwithstanding the negligence of the defendant, as you may find it to have been established, was herself guilty of contributory negligence in stepping back into the pathway of this automobile, as the defendant claims she did<sup>83</sup>

**Wisconsin**

The operator is required to consider the condition of the surface of the highway, and in case the surface be icy or for any other reason slippery, making difficult any stopping of his car, he must reduce his speed to such a rate that he can stop his car on such a surface within one-half of his range of vision, and failure to do so is negligence<sup>84</sup>

<sup>82</sup> Power v Crown Stage Co, 82 CalApp 660, 256 P 457

<sup>83</sup> Briggs v Becker, 101 Conn 62, 124 A 826 See also Deutsch v LaBonne, 111 Conn 41, 149 A 244

<sup>84</sup> Deitsch v Darkow, Circuit Court, Marathon County, Wisconsin See also Gilmore v Orchard, 177 Wis 149, 187 NW 1005

### § 350. — Intersections and junctions.<sup>85</sup>

#### Alabama

The court charges the jury that if they believe from the evidence that the driver of the automobile was running at a reasonably prudent rate of speed and attempted to turn into Avenue E in a reasonably prudent manner on the occasion complained of, you should return a verdict for defendant.<sup>86</sup>

#### Arizona

If you believe from the evidence in this case that the defendant was operating his car at that time and place at an excessive rate of speed, a rate of speed in excess of 25 miles an hour, in approaching said intersection, to wit, 40 to 50 miles an hour, then I charge you that he was guilty of negligence in so operating said car upon said highway.<sup>87</sup>

#### Arkansas

Drivers of automobiles in approaching street crossings or an intersecting street must have their automobiles under control, prepared to stop if automobiles or other vehicles or pedestrians are passing over the intersection. Danger may always be expected or anticipated at street crossings or at intersections of streets, and every driver of an automobile should keep a lookout and approach same with his machine under control, else he can not be regarded or treated as exercising ordinary care.<sup>88</sup>

#### California

(1) If you find from a preponderance of the evidence that the defendant at the time of the alleged accident did drive his automobile into said intersection at a greater speed than 15 miles per hour, that in itself constituted negligence on the part of the defendant, and, if you further find from a preponderance of the evidence that the defendant did drive in excess of 15 miles per hour into said intersection and that was the proximate cause of the accident, then your verdict must be for the plaintiff, provided you further find from the evidence that the plaintiff himself was free from any negligence that proximately contributed to the accident.<sup>89</sup>

(2) If you find from a preponderance of the evidence that plaintiff was guilty of violating the speed limit in traversing the intersection, he would not be precluded from a recovery

<sup>85</sup> See also § 457, *infra*

<sup>86</sup> *Karpeles v City Ice Delivery Co.*, 198 Ala 449, 73 S 642

<sup>87</sup> *Chapman v Salazar*, 40 Ariz 215, 11 P2d 618

<sup>88</sup> *Smith Arkansas Traveler Co v Simmons*, 181 Ark 1024, 28 SW2d 1052

<sup>89</sup> *Fitzpatrick v Haskell*, 117 Cal App 684, 4 P2d 580

merely by reason of such violation unless you further found that such violation, if any, proximately contributed to the collision, or was one of the proximate causes of the collision.<sup>90</sup>

(3) If plaintiff approached and crossed the intersection in excess of the legal speed, he was guilty of negligence.<sup>91</sup>

#### Indiana.

I therefore instruct you that in order to recover on his allegation of negligent speed of the automobile, plaintiff is not required to prove any particular or specific speed when the automobile entered the intersection, if a preponderance of the evidence shows a speed which you may find to be negligent.<sup>92</sup>

#### Maryland

The court instructs the jury that it is the duty of one running an automobile to keep it under control, especially at road intersections and bridges, and if the jury find that the defendant's automobile in moving toward the intersecting road leading to the W home had proceeded far enough away from the south headwall of the drain mentioned in the evidence to enable the plaintiff's automobile to pass between her car and the said south headwall when he reached the point of said headwall, then the verdict of the jury must be for the defendant, even though they find that the plaintiff ran his car into the said headwall, and that it was damaged thereby.<sup>93</sup>

#### Michigan.

I charge you that it is the duty of the person operating a motor vehicle, on approaching an intersecting highway, and also in traversing an intersecting highway, to have said motor vehicle under control and to operate at such speed as is reasonable and proper, having regard to the traffic then on the highway and the safety of the public. If you find that defendant, upon the night in question, while proceeding along Grandville Avenue in his motor vehicle and approaching B Street, didn't have his motor vehicle under control, and didn't operate it at such speed as was reasonable and proper, having regard to the traffic then on the highway and the safety of the public, then said defendant violated the law of the state and would, in law, be deemed to be negligent. Those are some of the elements that would make the defendant negligent on his part.<sup>94</sup>

<sup>90</sup> *Silveira v Siegfried*, 135 Cal App 218, 26 P2d 666

<sup>91</sup> *Gutter v Niesley*, 1 CalApp 2d 69, 36 P2d 155

<sup>92</sup> *Neuwelt v Roush*, 119 IndApp

481, 85 NE2d 506

<sup>93</sup> *Wingert v Cohill*, 136 Md 399, 110 A 857

<sup>94</sup> *Bouma v Dubois*, 169 Mich 422, 135 NW 322

**Missouri.**

The court instructs the jury that in this case plaintiff seeks to recover damages against defendant for personal injuries which plaintiff says he received in consequence of defendant's negligence, which negligence, according to the contention of plaintiff, consisted in defendant's operating an automobile in a southward direction on the west side of Grand Avenue, at or near Magnolia Avenue, on or about —, 19—, at a high and dangerous rate of speed and without sounding the horn on said automobile, or in any manner giving plaintiff warning of its approach. It is incumbent on plaintiff to reasonably satisfy the jury by the evidence of the existence of these facts before they can return a verdict against the defendant, and if the jury should find and believe from the evidence that defendant was not operating or running the automobile at a high or at a dangerous rate of speed, and that he did sound the horn thereof or otherwise gave plaintiff warning of its approach, then it will be the duty of the jury to return a verdict in favor of the defendant <sup>95</sup>

**North Carolina**

If you find from the evidence, and by its greater weight, that defendant W operated his automobile into the intersection at a careless and reckless rate of speed, then the court instructs you he would be guilty of negligence, and if you further find from the evidence, and by its greater weight, that the breach of duty by him was one of the proximate causes of injury to the plaintiff, the court instructs you he would be guilty of actionable negligence, or if you find from the evidence, and by its greater weight that he exceeded the speed limit as provided in subsection — of the city ordinance of — miles an hour, the court instructs you upon that finding he would be guilty of negligence, and if the plaintiff has further satisfied you, by the greater weight of the evidence, that the violation was the proximate cause or one of the proximate causes of her injury, then the court instructs you that that would be actionable negligence <sup>96</sup>

**Ohio**

In considering whether or not the speed of defendant's car was greater than was reasonable and proper, you have a right to consider as one of the circumstances, the existence of the red light at the intersection of E 130th Street and A Avenue; and

<sup>95</sup> *Bongner v Zeigenthal*, 165 Mo App 328, 147 SW 182. See also *Cool v Petersen*, 199 MoApp 717, 175 SW 244, 178 SE 231.  
<sup>96</sup> *Gaffney v Phelps*, 207 NC 553.

if you find further that the word "stop" appeared on all sides of that red light you would also have the right to take that into account in determining whether or not defendant's speed at and immediately before the accident was greater than was reasonable and proper.<sup>97</sup>

#### Oregon

You are further instructed that it is the law of this state that every person operating a motor vehicle shall not exceed — miles per hour within the city of — and — miles per hour at intersections, and in no case shall a motor vehicle be operated at any speed that will endanger the property of another, or the life and limb of any person.<sup>98</sup>

#### Pennsylvania

At crossings of streets, drivers of all motor vehicles must be highly vigilant and maintain such control of their cars, that, on the shortest possible notice, they can stop so as to prevent damage or injury.<sup>99</sup>

#### § 351. — Highways outside cities.<sup>1</sup>

#### § 352. — Residence or sparsely settled portions of city.

#### California

Subject to the provisions of subdivision—of this section and except in those instances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following — miles an hour in a residence district as defined herein, and I further instruct you that if, under the conditions that prevailed at the time of the collision complained of in plaintiff's complaint, the motor vehicle operated by the defendant at a rate of speed allowed by law, upon the application of its brakes was likely to crash into other vehicles, then a speed within the maximum allowed by law would be unlawful, and the jury would have a right to consider that under the circumstances, the defendant, S L., was not exercising reasonable and proper care or having due regard to the traffic or surface of the highway on which he was traveling.<sup>2</sup>

<sup>97</sup> Wolfe v Baskin, 137 OhSt 284, 28 NE2d 629

<sup>98</sup> McCallister v Farra, 117 Or 278, 243 P 785

<sup>99</sup> Weinberg v Pavitt, 304 Pa 312, 155 A 867.

<sup>1</sup> See § 381, *infra*

<sup>2</sup> Handley v Lombardi, 122 Cal App 22, 9 P2d 867 See also Galway v Pacific Auto Stages, Inc, 96 Cal App 169, 273 P 866

**Indiana.**

(1) It is the law in Indiana that no person shall drive or operate a motor vehicle upon any public highway in this state at a greater rate of speed than is reasonable and prudent, having regard to the traffic and use of the highway, or so as to endanger the life or limbs or injure the property of any person, and anyone who drives upon any such highway at such greater rate is guilty of negligence, and if he drives upon any such highway in an incorporated city in the state of Indiana at a rate of speed exceeding — miles an hour, it is prima facie evidence of negligence on the part of such driver, and if you find from the evidence in this case that at the time in question the defendant was, by its servant, then and there employed by defendant to operate its motor-bus, driving its motor-bus on a public highway within the corporate limits of the city of Indianapolis, Indiana, at a rate of speed in excess of — miles an hour, defendant will be presumed to have been guilty of negligence, but this presumption can be overcome by defendant's proving that such rate of speed was reasonable and prudent, having regard to the traffic and use and condition of the highway in question and the safety of the persons using such highway, and having regard to all surrounding conditions and circumstances as shown by the evidence, and if you find from the evidence that defendant was guilty of such negligence and as a proximate result of such negligence, plaintiff's car was injured and damaged as set out in the complaint and without negligence on the part of plaintiff or the person driving plaintiff's car, which proximately contributed to such damage or injury, then plaintiff is entitled to recover in this action and your verdict should be for the plaintiff. In determining whether this presumption has been overcome, you should consider all the evidence introduced in the case, whether upon the part of plaintiff or defendant, and likewise you should consider all such evidence in determining whether such presumption has been raised.<sup>3</sup>

**Texas**

The court instructs the jury that the undisputed evidence offered in this case shows that Alameda Avenue, where the accident occurred, is a public street. You are instructed that it would be negligence on the part of W to operate an automobile on that street, where he was operating it immediately before and at the time the accident occurred, at a greater rate of speed than — miles an hour.<sup>4</sup>

<sup>3</sup> *McCreight v Peoples Motor Coach Co.*, Circuit Court, Marion County, Indiana, No 39512

<sup>4</sup> *Lefkovitz v Sherwood* (TexCiv App), 136 SW 850

**§ 353. — Closely built up, thickly settled, or business portions of city.**

**California**

It is against the law for any person to operate a motor vehicle upon a public highway at a greater speed than — miles per hour when the territory contiguous thereto is closely built up. It is for the jury to decide whether, at the locality where the collision occurred, it was closely built up at the time of the accident <sup>5</sup>

**Indiana**

If a motor vehicle is driven upon a public street in an incorporated city where the same passes through a closely built up business portion of the city at a speed in excess of — miles an hour, or if a motor vehicle is driven on a public street in an incorporated city in the residential portion of the city at a speed that exceeds — miles an hour, then such speed is prima facie evidence of negligence and that said motor vehicle is running at a speed greater than is reasonable and prudent having regard to the traffic and the use of the way. <sup>6</sup>

**Missouri**

You are further instructed that by ordinance of the city of St Louis, in force and effect at the time of the accident in question, it was unlawful to drive an automobile at a greater rate of speed than — miles per hour in the business portions of said city. The term "business portion of the city," as used in this instruction, means a part of the city principally built up with structures devoted to business. And if you find from the evidence that defendant was running the automobile in question eastwardly on Delmar Avenue approaching the intersection thereof with De Balviere Avenue, and that said automobile collided with plaintiff and injured her at or near the intersection of said avenue, and that, as said automobile was approaching said intersection, and as it collided with plaintiff, it was being run by defendant at a greater rate of speed than — miles per hour, and if you further find from the evidence that the part of said Delmar Avenue on which defendant was thus approaching said intersection and the place where said avenues intersect each other was in a business portion of said city as above defined, then such running of said automobile at a speed in excess of — miles per hour was negligence on his part. And if you further find from the evidence that such negligence di-

<sup>5</sup> Freiburg v Israel, 45 CalApp Court, Marion County, Indiana, No 138 187 P 130 31483

<sup>6</sup> Lazov v. Eastman, Circuit



rectly contributed to cause plaintiff's injuries, if you find she was injured, and if you further find that she was exercising ordinary care for her own safety, your verdict must be for the plaintiff <sup>7</sup>

#### Ohio.

Ladies and gentlemen of the jury, I charge you that if you find the intersection of Seventh and Walnut Streets in the city of Hamilton, Ohio, was on March —, 19—, a closely built-up or business portion of said city of Hamilton, Ohio, then I charge you that any rate of speed in excess of — miles per hour at that point was *prima facie* unlawful <sup>8</sup>

#### Washington

If you find from a fair preponderance of the evidence in this case that the defendant R. W., at the time of the collision of the automobile he was using, with the automobile of defendant E. D. M., was in charge of such automobile on a street in the city of Tacoma, and at a place on said street which was within a thickly settled portion of said city of Tacoma and was at the time and place driving such automobile at a rate of speed faster than — miles per hour, and that by reason thereof you further find that the plaintiff was injured because of such rate of speed being faster than — miles per hour at such a place, then you are instructed that the defendants D. A. W. and R. W. would be liable for the consequences of such rate of speed at such a place. <sup>9</sup>

### § 354. Condition and equipment of vehicle; proper use of equipment and accessories.

#### Arkansas.

If, in order to test whether the repairs had been properly made, it was necessary and usual to drive the car around, and they had been using the streets for this purpose instead of some other testing ground elsewhere, the necessity for making such test does not excuse the repairer or his master from exercising ordinary care in the use of the streets in driving the car thereon, nor from being guilty of negligence in not having ascertained the condition of the car that was left for repairs and had

<sup>7</sup> Evans v Klusmeyer, 301 Mo 352 256 SW 1036

<sup>8</sup> Washington Fidelity Nat Ins Co v Herbert, 125 OhSt 591, 183 NE 537 See also Makranczy v Gelfand, 109 OhSt 325, 142 NE 688,

Reed v Hensel, 26 OhApp 79, 159 NE 843

<sup>9</sup> Jaquith v Worden, 73 Wash 349, 132 P 33, 48 LRA 827 See also Burlie v Stephens, 113 Wash 182, 193 P 684

to be driven about the streets to determine whether said repairs were properly made.<sup>10</sup>

#### California

(1) At the time of the accident involved in this case, the Vehicle Act \* \* \* made it unlawful for any person to operate a motor vehicle upon any public highway unless such motor vehicle was in such safe condition mechanically that its operation would not endanger the life of the driver or the lives of occupants of the vehicle or of other persons upon the highway. It is the duty of one operating a motor vehicle to see that it is so equipped in order that it may at all times be under control and not become a menace to other traffic on the highway.<sup>11</sup>

(2) You are instructed that section 679 of the California Vehicle Code is in full force and effect at the time of this accident, stated as follows: "It is unlawful to operate upon any highway a vehicle which is in an unsafe condition."

If you should find from the evidence that the defendant conducted himself in violation of section 679, just read to you, you are instructed that such conduct constituted negligence as a matter of law.

If you find that in view of the circumstances surrounding the use and the operation of the truck, the history, if any, of break-down repairs of the truck and the type and weight of the load which said truck customarily carried, said corporation, its officers, agents or employees knew, or upon reasonable inspection in the exercise of ordinary care would have known, of a defective condition, if any, of said truck, and of the danger that would be involved in its operation on a public highway, and if you should further find that said corporation nevertheless permitted the operation of said truck upon a public highway in such dangerous or defective condition, if any, you are instructed that B. D. Corporation was negligent.

The defendant is not a guarantor or insurer of its equipment on the highway. The mere fact, if such be a fact, that an accident may occur as a result of some mechanical failure of a defendant's equipment does not in itself impose liability to others upon such defendant. If an equipment operator uses the degree of care in the use and maintenance of his equipment that an ordinarily prudent equipment operator would use under the same or similar circumstances, he does all the law requires.

<sup>10</sup> Cox v. Divine, 187 Ark. 1162, 63 SW2d 982.

<sup>11</sup> Maus v. Scavenger Protective Assn., 2 CalApp. 624, 39 P.2d 209.

and he is not liable to others for injury or damage that may come to them through its failure.

Whether or not defendants' truck was inspected, and at what intervals, if any, and whatever mechanical attention was or was not given said equipment by defendants, is to be considered by you the same as any other evidence in this case

However, unless you find that some want of ordinary care in maintenance was a proximate cause of this accident, you must not further consider these matters in arriving at your verdict

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances <sup>12</sup>

#### Kansas.

While an automobile in good mechanical condition is not a dangerous instrumentality, yet one which is so defective that it can not readily be controlled is highly dangerous, owing to its weight, power and speed; and the rule of law is thoroughly established that the owner of an instrumentality of dangerous character is bound to take exceptional precautions to prevent its doing mischief to others <sup>13</sup>

#### Oregon

An automobile, which is knowingly unmanageable, is such a dangerous instrumentality that it is negligence to allow its use on the highway. <sup>14</sup>

#### Texas.

If an automobile breaks down on the road and an agent of the firm or company turns it over to the care and custody of some third party to be repaired and brought in, and, while it is being brought in for this purpose, an accident occurs, no liability would attach to the owner of the automobile for such accident, unless the defects in the machine were of such a character as to make it ungovernable and dangerous to be run on the public road, and the party turning it over for repairs and

<sup>12</sup> Mallot v Blue Diamond Corp, Gas Co, 110 Kan 254, 203 P 909  
156 CalApp2d 186, 319 P2d 391

<sup>14</sup> Foster v Farra, 117 Or 286,

<sup>13</sup> Tannahill v Depositors Oil & 243 P 778

to be brought in knew that these defects made the machine dangerous to be run, or should have known of them by the use of ordinary care. In determining whether this would be negligence, the test would be Would a person of ordinary prudence, under similar circumstances, have turned such a machine over to be brought in on its own power? If so, it would not be negligence, but if a person of ordinary prudence under similar circumstances, would not have done this, it would be negligence.<sup>15</sup>

Washington.

One who undertakes to drive an automobile on the public streets and highways is charged with notice of everything that a reasonable inspection would disclose, concerning the condition of the automobile for safe operation, whether the car belongs to him, or to another and is loaned or rented to him for the occasion.<sup>16</sup>

### § 355. — Brakes.

Alabama

I charge you, gentlemen of the jury, if you are reasonably satisfied from the evidence that B G at the time and place did not use the brake until she was so close to Mrs. A that at the rate of speed she was traveling at said time, it would have been impossible to avoid striking her with the brakes in good condition, then you can not award Mrs A any damages.<sup>17</sup>

Arkansas

If you find that the brakes were defective, and by reason thereof the employee of defendants was unable to stop the car or reduce its speed in time to prevent the injury, and provided further that the defendants or their employee knew of such defective condition of the brake or by the exercise of ordinary care could have found it out, then you are instructed that the plaintiff is entitled to recover for any injury that resulted by reason of any such defective condition of the brake, provided he was exercising reasonable care for his own safety<sup>18</sup>

California

You are further instructed that the Vehicle Act of the state of California in force and effect at the time of the accident in

<sup>15</sup> Texas Co v Veloz (TexCiv App), 162 SW 377

<sup>16</sup> Petersen v Seattle Automobile Co, Inc, 149 Wash 648, 271 P 1001

<sup>17</sup> Saunders System Birmingham

Co v Adams, 217 Ala 621, 117 S 72, 61 ALR 1333

<sup>18</sup> Cox v Divine, 187 Ark 1162, 63 SW2d 982

question further provided in part as follows: "Every motor vehicle operated upon a public highway shall be provided at all times with brakes which shall be adequate to properly check the speed of and to stop such motor vehicle"

And you are further instructed that the failure to use reasonable care to comply with said provision of the law would be negligence as a matter of law, and therefore, if you find from a preponderance of all of the evidence that the defendants failed to use reasonable care to have said motor vehicle, operated by them, provided at the time of the accident with brakes which were adequate to promptly check the speed of and to stop said vehicle, and that such failure was a proximate cause of the accident in question, then your verdict must be in favor of the plaintiff, unless you should further find from a preponderance of all of the evidence, and under the instructions of the court, that the plaintiff was also guilty of negligence which was a proximate cause of the accident in question <sup>19</sup>

#### Colorado

You are instructed that the ordinance of the city of Colorado Springs provides that every motor vehicle operated on the streets of the city shall be provided with at least two adequate brakes, each of which shall work independently of the other, except motor-cycles, which shall be provided with at least one adequate brake; and the brakes of every motor vehicle shall be of such power when applied to bring such vehicle to a full stop when running at the following speeds within the following distances from the point where the brake pressure is applied:

10 miles an hour, 10 feet.

15 miles an hour, 21 feet

20 miles an hour, 37 feet. <sup>20</sup>

#### Georgia

The law requires motor vehicles while in use upon the public streets to be equipped with efficient and serviceable brakes; and the operation of the truck along the public streets not so equipped constituted negligence per se. <sup>21</sup>

#### Oregon

I instruct you that the laws of the state of Oregon concerning the brakes on a motor vehicle which I have just mentioned

<sup>19</sup> Vedder v Bueley, 92 CalApp 52, 267 P 724 See also Walters v Du Four, 132 CalApp 72, 22 P 2d 259, 23 P2d 1020

<sup>20</sup> Parker v Ullom, 84 Colo 433, 271 P 187

<sup>21</sup> Orange Crush Bottling Co v Smith, 35 GaApp 92, 132 SE 259

are absolute, that is, the law does not make any exceptions or allow any excuses.

The defendants in this case have admitted that the truck involved in this collision did not have effective brakes at the time of the collision, under these circumstances, the defendants were guilty of negligence by reason of that fact alone, under these circumstances, the sole questions for your consideration are whether such negligence was the proximate cause of the injuries, if any, that the plaintiff sustained, and if you find he did so sustain injuries, then you shall turn to the consideration of the question of damages <sup>22</sup>

**Tennessee**

The court further instructs you, gentlemen, that if you shall find from a preponderance of all the evidence in the case that the defendant parked his automobile on his slanting or inclined driveway with the intention of leaving it unattended while small children were known by him to be playing around and about it, and specially if the doors were left unlocked so they could get into the car, then it was the defendant's duty to set up his handbrake securely and to do everything else that he could do, by the exercise of ordinary care, to keep the car from rolling down hill. It was also the defendant's duty to see to it and know that this handbrake was in good repair at the time he left the car unattended under such circumstances, if he could have known or ascertained the condition of said handbrake by the exercise of ordinary care; and if you shall find from a preponderance of all the evidence in the case that the defendant failed to perform his duty, as above set out, and that such failure was the sole, proximate cause of the accident, then the defendant would be liable in this case and your verdict should be in favor of the plaintiff.

Gentlemen, the court further instructs you, that if you shall find from a preponderance of all the evidence in the case that the handbrake on defendant's car was set up by the defendant under the circumstances heretofore set forth in this charge, and that while said handbrake was sufficient to hold the car from running backward down that driveway at the time the brake was set up but that the pawl or safeguard that was intended to fit into the teeth or notches of the brake ratchet, or such teeth or notches themselves, were so worn or defective that slight pressure, such as a child coming in contact with the brake lever, was sufficient to release the car and cause it to

<sup>22</sup> *Nettleton v James*, 212 Or 375, 319 P2d 879.

run backward down that inclined driveway, and if you shall further find that the defendant had knowledge of such defective condition, or that he could have had such knowledge by the exercise of ordinary care, that said defect constituted the sole proximate cause of the injury complained of, then the defendant would be liable in this case <sup>23</sup>

### § 356. — Lights.

#### Alabama

I charge you, gentlemen of the jury, that the fact, if it be a fact, that defendant's truck had no rear light on it when and while running along the highway from Montgomery to the point where it stopped and parked, should not be considered by you as evidence of any negligence of the defendant for which he is being sued in this case <sup>24</sup>

#### California

It is negligence for the driver of a motor vehicle to continue his onward course when he is unable to see the road over which he is driving <sup>25</sup>

#### Colorado

The absence of plaintiff's left headlight, if the collision would not have taken place without such absence, either because it misled the defendant as to the location of plaintiff's car, or because it led the plaintiff to turn into the trailer, would prevent a verdict for plaintiff <sup>26</sup>

#### Indiana

The jury are instructed that it is one of the purposes of the statute of the state of Indiana referred to in the foregoing instructions to require those who own or control motor vehicles to place lights upon them during the time set forth in the statute when being used upon the streets and public highways of the state so as to furnish a warning to other people in making use of such public highways, and that a violation of that provision of said statute constitutes negligence <sup>27</sup>

#### Michigan

(1) I further charge that in this case defendant was required by law to have such lights as would show objects

<sup>23</sup> *Garis v Eberling*, 18 TennApp 1, 71 SW2d 215

<sup>24</sup> *Littlejohn v Staggers*, 23 Ala App 322, 125 S 61

<sup>25</sup> *Chalmers v Hawkins*, 78 Cal App 733, 248 P 727 See also *Pope v Halpern*, 193 Cal 168, 223 P 470, *Elsev v Domecq*, 114 CalApp 42,

299 P 794

<sup>26</sup> *Martin v Cairuthers*, 69 Colo 464, 195 P 105

<sup>27</sup> *Koplovitz v Jensen*, Superior Court, Lake County, Indiana, No 19928, see 197 Ind 475, 151 NE 390

immediately in front of him, and he was required by law to have his Ford touring car under such control as not to run down other vehicles within the scope of his lights. One restriction on his speed is that he shall keep the vehicle under such control and operate it at such speed that he can stop the machine and avoid another traveler within the distance that the highway is illuminated with his lights.<sup>28</sup>

(2) You are instructed it would be negligence for a person to propel his automobile in a dark place in which he had to rely on the light of a lantern, attached to his machine, at a rate of speed faster than enabled him to stop or avoid any travelers within the radius of his light, or within the distance to which his light would disclose the existence of other travelers lawfully using the highway.<sup>29</sup>

#### New York

(1) The failure to have a light on the plaintiff's vehicle is *prima facie* evidence of contributory negligence on the part of the plaintiff.<sup>30</sup>

(2) Failure to have a light on the defendant's car establishes a *prima facie* case of negligence.<sup>31</sup>

(3) The mere fact that there wasn't any light on that motor vehicle does not necessarily make the defendant guilty of negligence, but it is an element to be taken into consideration as to whether or not he was guilty of negligence, it is only negligent provided that it was the proximate cause of the accident. If the fact that the motor vehicle did not have a light on it was the cause of the accident, then you can say that the failure to have a light on the automobile was negligence.<sup>32</sup>

#### Oregon

Defendants would not be liable in damages for failure to observe some requirement of the law in respect to lights, unless such failure contributed to the injury.<sup>33</sup>

#### Pennsylvania

It is negligence to drive an automobile at a very rapid rate at night without lights necessary to enable a person crossing the road to see that the automobile is coming and to enable

<sup>28</sup> Ott v Wilson, 216 Mich 499, 185 NW 860

<sup>29</sup> Ott v Wilson, 216 Mich 499, 185 NW 860

<sup>30</sup> Martin v Herzog, 176 App Div 614, 163 NYS 189

<sup>31</sup> Giminski v Irving, 210 App Div 343, 206 NYS 119

<sup>32</sup> Giminski v Irving, 210 App Div 343, 206 NYS 119

<sup>33</sup> Archer v Gage, 126 Or 532, 270 P 521



the driver to see ahead and know whether there are persons or vehicles in the road in front of him. The driver of an automobile is held to the degree of care which an ordinarily prudent person would exercise under the circumstances. The rate of speed should be consistent with reasonable safety and the lights necessary to afford reasonable protection to others on the road should be lit.<sup>34</sup>

#### Utah

Actionable negligence may not be predicated on a failure to have lights, or to sound the horn, or to drive a car in violation of an ordinance or statute, unless such unlawful or negligent acts, or some of them, constitute the proximate cause of the injury.<sup>35</sup>

#### § 357. — Horn and other signaling devices.

#### Alabama

If you are reasonably satisfied from the evidence that B failed to blow the horn of his automobile as he approached the curve where the accident occurred, then I charge you as a matter of law that he was guilty of negligence, if his view was obstructed.

If you are reasonably satisfied from the evidence that the defendant B. did not give any warning with the horn on his automobile as he approached the curve where the accident occurred, and that his failure to sound the horn was the proximate cause of plaintiff's injury, then your verdict should be for the plaintiff.<sup>36</sup>

#### California

Every motor vehicle when operated on the public highway must be equipped with a horn capable of emitting sounds audible under normal conditions at a distance of not less than 200 feet.<sup>37</sup>

#### Connecticut

(1) The law, as you see, gentlemen, contemplates that the sounding of the horn must be given at such a distance as to be an adequate warning of danger. If the warning were given when the car is practically upon the victim of the collision, there would

<sup>34</sup> Curran v Lorch, 247 Pa 429, 93 A 492

<sup>35</sup> Wilcox v Wunderlich, 73 Utah 1, 272 P 207

<sup>36</sup> Bradford v Carson, 223 Ala 594, 137 S 426 See also Vansandt

v. Brewer, 209 Ala 131, 95 S 463

<sup>37</sup> Evans v Mitchell, 2 CalApp2d 702, 38 P2d 437 See also Sheldon v James, 175 Cal 474, 166 P 8, 2 ALR 1493, Rush v Lagomarsino, 196 Cal 308, 237 P 1066

be no warning, as the object of the warning is to permit the person who is in danger to turn to the right as soon as practicable, to enable the overtaking car to pass him or her. So that if the approaching car were so close to them that even if the plaintiff's intestate heard the warning, though the plaintiff did not, and she had no time to stop and think, she would not be barred from recovery of damages, provided the injury received was due to the fact that the defendant did not have his car under proper control, and did not sufficiently reduce or slacken its speed, or stop altogether, if you find that the exercise of reasonable care on his part required it <sup>38</sup>

(2) As to the matter of sounding a horn or other warning, due care requires that when the operator of a motor vehicle sees a pedestrian in or about to enter his course he shall sound his horn or otherwise give warning of his approach. You will inquire, first, whether under the conditions existing, due care required the defendant to give such warning of his approach, and, if you determine that such warning was required, you will decide whether such warning was given by him as reasonable care required. In this connection, I am requested to and do charge you that the mere sounding of a horn or signal is not in itself sufficient to give immunity from liability, but the operator must also operate his car under such a degree of control as reasonable care requires <sup>39</sup>

#### Delaware

Likewise, if the automobile at the time of the accident approached the plaintiff walking upon the public highway, and the operator failed to give reasonable warning of his approach, and the plaintiff was injured without fault on the part of the plaintiff, the defendant would be liable <sup>40</sup>

#### Georgia

Whether the use of a gong, a horn, or other warning to pedestrians, is necessary in the exercise of due diligence by the driver of an automobile, and whether the failure of the driver to give these or other cautionary signals is negligence, are jury questions, dependent for solution upon the peculiar facts of the particular case. <sup>41</sup>

#### Iowa

You are instructed that if in the operation of the defendant's automobile at the time and place and under the cir-

<sup>38</sup> O'Connor v Zavaritis, 95 Conn 111, 110 A 878. See also Andrews v Dougherty, 96 Conn 40, 112 A 700.

<sup>39</sup> Demonde v Targett, 97 Conn

59, 115 A 470

<sup>40</sup> Grier v Samuel, 4 Boyce (27 Del) 106, 86 A 209

<sup>41</sup> Huckabee v Grace, 48 GaApp 621, 173 SE 744

cumstances and conditions existing at the time, a careful and prudent person in the exercise of reasonable and ordinary care would have given a warning of his approach to the place where the accident occurred, then it was the duty of the defendant, in the exercise of such reasonable and ordinary care to have given warning of his approach, and a failure on his part to do so would be negligence <sup>42</sup>

#### Kentucky

(1) It is the duty of the person operating an automobile to sound his horn or other device whenever necessary as a warning of the approach of such vehicle to pedestrians or other vehicles <sup>43</sup>

(2) The driver of an automobile may be proceeding with the utmost degree of care and yet an occasion may arise where it is necessary for him to sound his horn in order to comply fully with his duty, and when such an occasion does arise, he can not be excused on the ground that he was proceeding with his automobile in the exercise of ordinary care for the safety of others. He must give the required signal to warn others of his approach if he would be fully excused <sup>44</sup>

#### Missouri

(1) The court instructs the jury that if you find and believe from the evidence that the defendant negligently and carelessly failed to sound a signal of warning of the approach to plaintiff of the automobile in question, and that said negligence, if any,

<sup>42</sup> Engle v Nelson, 220 Ia 771, 263 NW 505. Concerning this instruction the court said "This instruction is in the usual and approved form and does not, as claimed by the appellant, instruct the jury that a failure to warn would permit the returning of a verdict for plaintiff. Standing alone, the instruction might be subject to criticism, but as we have said, the instruction must be read as a whole, and when read in connection with instruction No IX, it is not subject to criticism. In instruction No IX, the court told the jury that if they found the defendant negligent in any of the particulars charged, 'their next duty is to determine whether such negligence was the direct and proximate cause of the accident,' and that in order to warrant a recovery by the plaintiff it

must not only be shown by a preponderance of the evidence that the negligence of the defendant was the direct and proximate cause of the accident, and that it must be more than a contributing cause. There is no merit in the objection as to the giving of instruction No VIII."

<sup>43</sup> Gretton v Duncan, 238 Ky 554, 38 SW2d 448. See also Weidner v Otter, 171 Ky 167, 188 SW 335, Slate v Witt, 188 Ky 133, 221 SW 217, Ware v Saufley, 194 Ky 53, 237 SW 1060, 24 ALR 500, Deshazer v Cheatham, 233 Ky 59, 24 SW2d 936, Marsee v Bates, 235 Ky 60, 29 SW2d 632, Golubic v Rasnick, 239 Ky 355, 39 SW2d 513.

<sup>44</sup> Best's Admr v Adams, 234 Ky 702, 28 SW2d 484.

directly caused the injuries, if any, to plaintiff, then your verdict must be for the plaintiff.<sup>45</sup>

(2) In the absence of any statute on the subject, it is the duty of the driver of a motor vehicle to give a signal or warning of his intention to turn his motor vehicle to the right or left where the circumstances and conditions are such that care and prudence would dictate such signal or warning be given, in order to protect the lives and property of other persons then on or using the highways.<sup>46</sup>

#### New York.

If you find from the evidence that the driver's view was obstructed as he approached the intersection of the streets in question, then it was his duty to blow his horn or give warning of his approach.<sup>47</sup>

#### North Carolina

The law requires every person operating an automobile upon a public highway to use that degree of care that a reasonably careful person would use under like or similar circumstances to prevent injury or death to persons on or traveling over, upon or across such highways, and any person so operating an automobile when approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway, or a corner in a highway when the operator's view is obstructed, shall slow down and give a timely signal with his bell, horn or other device for signaling, and the failure of any person so operating such motor vehicle so to do is negligence.<sup>48</sup>

#### Ohio

If, from a preponderance of the evidence, you find that the defendant, the Y. S. T. Co., in the exercise of ordinary care, should have sounded a warning as it operated its said bus into the stream of traffic, at the time and place alleged, but neglected so to do, and that as a proximate result of its failure, a collision occurred and plaintiff received injury, then the defendant company was guilty of actionable negligence and if plaintiff was in the exercise of ordinary care, your verdict in this case should be for W. B. S.<sup>49</sup>

<sup>45</sup> *Buck v. Thatcher*, 222 MoApp 1036, 7 SW2d 398. See also *Brooks v. Harris* (MoApp), 207 SW 293, *Zimmer v. Daugherty* (MoApp), 32 SW2d 765.

<sup>46</sup> *Nance v. Lansdell* (MoApp),

73 SW2d 346.

<sup>47</sup> *Thomson v. Gasteiger*, 199 App Div 744, 192 NYS 430.

<sup>48</sup> *Goss v. Williams*, 196 NC 213, 145 SE 169.

<sup>49</sup> *Stoops v. Youngstown Sub-*

**Oregon**

With reference to that, I advise you that the law does not require the blowing of any horn or the giving of a signal as a statutory provision. The law does require every automobile to be equipped with some device for giving an alarm, and it states that that alarm shall be used in attempting to pass other automobiles, but the law does say this, that if a reasonably prudent person in a given situation would sound an alarm, then it would be negligence not to sound one in that situation, and that is the rule of law you will apply in this case—would it have been the part of a prudent, careful driver, one exercising due care, to have sounded the horn in the situation shown by the testimony in this case? If you say that it would have been the part of prudence so to have done, then you would say the defendant was negligent if you find he did not do that. If you say that there was nothing here that would require a reasonably careful and prudent driver to sound an alarm, then it was not negligence to have failed to sound one. The statute does require in turning that you give a timely warning. It states how that shall be made. If you are intending to turn to the left, you should give some timely signal to indicate to the person following you that you are about to turn. The statute seems to indicate that that provision is intended for vehicular traffic, automobiles following you, or those approaching you, or those about to pass you; but it is a provision of the statute that is available for whatever benefit it may be to any other person, and in turning at an intersection, you may consider the question of whether or not he did give any signal of the turning, and if he failed to give a signal and that failure was the cause of the damage, if you find there was any, then that would be negligence that would be actionable, and plaintiff would be entitled to recover if he were free from negligence.<sup>50</sup>

**Utah**

Actionable negligence may not be predicated on a failure to have lights, or to sound the horn, or to drive a car in violation of an ordinance or statute, unless such unlawful or negligent acts, or some of them, constitute the proximate cause of the injury.<sup>51</sup>

**Washington**

(1) Even though you find from the evidence in this case that the school district was negligent in failing to equip the

urban Transp Co, 121 OhSt 437, 284 P 565

169 NE 456

<sup>51</sup> Wilcox v Wunderlich, 73 Utah

<sup>50</sup> Fiebigler v Rambo, 132 Or 115, 1, 272 P 207

school bus with a mechanical or electrical device capable of displaying signals to the rear of the bus as to the intention of the driver to turn, still if you further find from the evidence that the driver of the school bus gave a timely arm signal of his intention to turn prior to the time he turned to the left, and that the plaintiff's automobile was operated to the left of the bus and from his position on the street he saw, or in the exercise of ordinary care, ought to have seen such arm signal, then under such circumstances, members of the jury, the failure of the school district to provide such mechanical device is immaterial to a determination of this case and should be disregarded by you, because under such circumstances the failure to provide such device would not be the proximate cause of the accident.<sup>52</sup>

#### Wisconsin

The law is that "every automobile, while being used upon any public highway of the state, shall be provided with efficient brakes and an adequate bell, horn or other signaling device." While there is no rule of law which requires the driver of an automobile to sound his horn in approaching an intersection, or pedestrian upon the highway, a failure to properly and reasonably warn by the sounding of a horn may, under certain circumstances, be negligence. It will be for you to determine whether, under the circumstances in this case, a timely sounding of the horn would have tended to avoid the injury in this case.<sup>53</sup>

#### § 357A. — Mirror.

I instruct you that inasmuch as there has been no allegation of negligence against the defendants, J. & M., from their failure to have their automobile equipped with proper rear-view mirror, you are not entitled to take into consideration the fact, if it is a fact, that such mirror was broken or otherwise defective; in other words, the plaintiff could only recover for the acts of negligence which are alleged in the complaint, and that was not alleged as one of the acts of negligence.<sup>54</sup>

#### § 358. — Steering gear or facilities.

##### California

It is not a complete defense for the defendant, R. F. Co., a corporation, to show merely that the automobile in question

<sup>52</sup> Farmer v School Dist No 214, 171 Wash 278, 17 P2d 899. See also Moy Quon v M Furuya Co, 81 Wash 526, 143 P 99, Edwards v Lambert, 121 Wash 380, 209 P 694, Colvin v Auto Interurban Co, 132

Wash 591, 232 P 365

<sup>53</sup> Hanes v Hermesen, 205 Wis 16, 236 NW 646

<sup>54</sup> Peters v Johnson, 124 Or 237, 264 P 459

was caused to run on the sidewalk by reason of the breaking of some part or portion of the steering gear of its automobile by reason of which the driver lost the power to control the same. It was the duty of the R. F. Co. to exercise reasonable care in ascertaining whether or not the automobile in question was in reasonably safe condition for its employees to use and if from the evidence in this case you believe that there was a failure upon the part of the R. F. Co., a corporation, to exercise this degree of care in maintaining its automobile, and that such failure, if any, proximately contributed to the happening of the accident, then and in that event the defendant R. F. Co., a corporation, would be responsible in damages to any person injured thereby. <sup>55</sup>

**Oregon.**

It is the duty of the owner or one in possession of a motor vehicle to see that it is adequately equipped with steering apparatus. <sup>56</sup>

**Virginia.**

The court further instructs the jury that if it appears from the evidence that it is just as likely that the injury and death of the plaintiff's intestate was caused by some defect in, or the getting out of order of, the steering gear, accelerator or some other part of the car as from the reckless and wanton operation of the car by the defendant, then they must find for the defendant. The law required a plaintiff to show by a preponderance of the evidence that the injury complained of was caused by some cause for which defendant was liable, and if it appears from the evidence that it is as probable that the injury was caused by some cause for which the defendant was not liable, then the plaintiff can not recover. <sup>57</sup>

**§ 359. — Accelerator sticking.**

The court further instructs the jury that if it appears from the evidence that it is just as likely that the injury and death of the plaintiff's intestate was caused by some defect in, or the getting out of order of, the steering gear, accelerator or some other part of the car as from the reckless and wanton operation of the car by the defendant, then they must find for the defendant. The law requires a plaintiff to show by a preponderance of the evidence that the injury complained of was caused by some cause for which the defendant was liable, and if it appears from the evidence that it was as probable that the injury was caused

<sup>55</sup> Brandes v Rucker Fuller Desk 278, 243 P 785  
Co., 102 CalApp 221, 282 P 1009

<sup>57</sup> Poole v Kelley, 162 Va 279, 173

<sup>56</sup> McCallister v Farra, 117 Or SE 537

by some cause for which the defendant was not liable, then the plaintiff can not recover <sup>58</sup>

**§ 360. — Radius rods.**

Unless the greater weight of evidence in this case shows that the radius rods of the car were defective and such fact was known to the defendant, you will not consider the allegation of excessive speed for any purpose. <sup>59</sup>

**§ 361. — Goods loaded and transported; length and width of vehicle and load.**

**Illinois.**

The court instructs you that, under the law, the maximum width of any vehicle and its load, excepting loads of loose hay, straw, corn fodder and other similar farm products, agricultural implements and threshing machines, shall not exceed eight feet, and in this case, if you find from the evidence that the width of defendant's truck, trailer and hopper in question was of a maximum width in excess of eight feet, and that said vehicle and load of said defendant was not such a vehicle or load as is excepted by law as above stated, and if you further find from the evidence that the fact that said vehicle and load of defendant was in excess of eight feet in width caused or contributed to the cause of the accident in question, then you have the right to take into consideration that fact, if you find it to be a fact, together with all other evidence in this case, in determining whether or not defendant was guilty of negligence on the occasion in question. <sup>60</sup>

**Kentucky**

If you believe from the evidence that on the occasion in question, defendant's truck was negligently loaded, and by reason thereof one of the oil drums fell from the truck to the left of the center of the highway and in the pathway of the car of the deceased, E S, and so near thereto as to place him in a position of sudden peril, and that in order to avoid said peril, if any, he, while exercising ordinary care for his own safety, turned his car to the left and drove into the truck and was thereby injured and killed, you will find for plaintiff Unless you so believe, or if you believe as in instruction No. 2, you will find for the defendant <sup>61</sup>

<sup>58</sup> Poole v Kelley, 162 Va 279, 173 SE 537 459

<sup>59</sup> Shaver v Nash, 190 Ark 410, 79 SW2d 53.

<sup>60</sup> Moore v Jansen, 265 IllApp

<sup>61</sup> Whitney Transfer Co v Smith's Admx, 256 Ky 844, 77 SW2d 440



**Missouri.**

If you further believe and find from the evidence that the driver of said truck knew, or by the exercise of ordinary care might have known, that such projecting part of the load thereon was reasonably likely to strike the plaintiff, and if you further find from the evidence that in so operating said automobile truck so close to the plaintiff as to cause the projecting part of the load to strike and injure him, if you find such to be the facts, the defendant's driver in charge of said truck was guilty of negligence, as negligence is elsewhere defined by these instructions, and that such negligence directly caused the plaintiff's injuries, if he was injured, then your verdict will be for the plaintiff <sup>62</sup>

**Oregon**

(1) The plaintiff contends that the defendants were negligent, in that they equipped and operated the motor vehicle, which struck and ran over the said child, with an iron baggage holder protruding some two feet in front of said car, containing keen sharp points and hard iron sides, and in that they failed to equip said vehicle with a bumper or fender protruding in front of said baggage holder. You are to determine, gentlemen of the jury, from all the facts and circumstances, the way the automobile was operated, the purpose for which it was used and intended to be used, as to whether or not a reasonably cautious prudent man would, under all of the circumstances, have equipped and operated a motor vehicle on the public streets and highways as this motor vehicle is alleged to have been equipped and operated, and if you find that a man of ordinary care and prudence would not have operated a motor vehicle so equipped with the iron baggage holder protruding in front of the car and unprotected by a bumper, and if you find such baggage holder on said car was the proximate cause of the injury complained of, then I instruct you that this would constitute negligence on the part of the defendants, and they would be responsible for any injury proximately resulting from such negligence. <sup>63</sup>

(2) I will state to you that it is the law of the state of Oregon that it is incumbent upon one who operates a vehicle, if the vehicle is overloaded so that the overload extends a distance of four feet or more from the rear of the body of the vehicle, such extension must be protected by a flag in daytime and a light at night. That is for the protection of other operators of vehicles and pedestrians. It would be negligence in and

<sup>62</sup> Boyle v Bunting Hdw Co  
(MoApp), 238 SW 155

<sup>63</sup> Archer v Gage, 126 Or 532,  
270 P 521

of itself, per se, if a violation of that should proximately cause an accident <sup>64</sup>

#### Pennsylvania

Did the H Co., in transporting that trailer, of a width of some 10 feet or more, do it in the way and manner that you or any other ordinary person, doing the same thing at the same time and under those same conditions, would have done? In arriving at a conclusion as to whether it was or was not so done, you must take into consideration the facts that it was on Saturday night, that the traffic was heavy, that the hard-surfaced road was about 16 feet in width, that there were apparently shoulders of a foot or foot and a half on either side of the hard-surfaced road, that it was a dark night in midsummer (August), that there were other vehicles upon the highway. \* \* \* You will have to take into consideration all the facts and circumstances, the lighting of this trailer, the length of the truck that was pulling it, the way and manner in which they were attached to each other, the width of the road, the condition of the night, the fact of the curve just beyond \* \* \* All these facts are elements entering into the final determination \* \* \* whether or not this defendant was actually guilty of negligence, and, if negligent, whether or not the plaintiff was guilty of contributory negligence. <sup>65</sup>

#### § 362. — Coupling of trailer to vehicle.

You are instructed that, where a car is struck in the rear, it makes a prima facie case of negligence, but this prima facie case can be rebutted by proof showing that a proper inspection had been made. You are instructed that, if you find by a preponderance of the evidence that the coupling was insufficient for the load in question or was improperly fastened, then you would be warranted in finding the defendant guilty of negligence.

If you find that a proper inspection was made of the truck and of the coupling on the day in question, then your verdict should be for the defendant of no cause of action.

If you find the damages were the result of a pure accident, then the plaintiff can not recover <sup>66</sup>

<sup>64</sup> Riley v Good, 142 Or 155, 18 P2d 222 (The number of feet of overload has been changed to four feet to conform to the latest Oregon statute )

<sup>65</sup> Nevlin Bus Line, Inc v Paul

R Hostetter Co , 305 Pa 72, 155 A 872

<sup>66</sup> Wilkowski v Grant Iron & Metal Co , 219 Mich 535, 189 NW 10

**§ 363. Competency of operator generally.****Arkansas**

An unskilful or inexperienced driver is not to be excused from liability for injuries inflicted because of his inexperience and unskilfulness. On the contrary, he should not frequent places where injury is liable to result from inexperience or unskilfulness in handling a car. When a person operates an automobile along a public highway frequented by other travelers, he assumes the responsibility for injuries resulting from his own unskilfulness in the operation of the car.<sup>67</sup>

**California**

If you find from the evidence that the injuries were caused solely by the defendant's lack of knowledge, skill, or experience in the management, control, or operation of said automobile, and that an ordinarily prudent, careful, cautious, and skilful man, \* \* \* in the due exercise of reasonable care, caution, and skill, could have avoided such injuries, then you are instructed that defendant's operation of the car with such lack of knowledge, skill, or experience in the operation and driving of said automobile constitutes and is, under such circumstances, negligence on his part.

You are entitled to consider, in arriving at your verdict, the familiarity or knowledge of the defendant with the appliances for the control and operation of his automobile, and his experience and skill, or lack thereof, in the management or control of said automobile.

In determining the defendant's experience, and whether or not he was familiar with the appliances for the control of his automobile, and whether he was confused in the use of them, the jurors are not bound to accept his statements as conclusive in this respect, but have a right to consider all of his acts and omissions at the time of the tragedy.<sup>68</sup>

**Oregon.**

You are further instructed that it is the law of this state that no vehicle shall be moved along or operated on the road, street, or highway of this state by any person unable to control and properly operate the same with due regard to the safety of the public and of other vehicles.<sup>69</sup>

<sup>67</sup> *Hughey v Lennox*, 142 Ark 593, 219 SW 323

<sup>69</sup> *McCallister v Farra*, 117 Or 278, 243 P 785

<sup>68</sup> *Dallas v De Yoe*, 53 CalApp 452, 200 P 361

**§ 364. Intoxication of operator or previous drinking of intoxicating liquors.**

**California**

A person who, while under the influence of intoxicating liquor, drives a vehicle upon a public street or highway is guilty of negligence as a matter of law.

Whether or not a person involved in an accident was then intoxicated is a proper question for the jury to consider in determining his conduct and whether or not he was negligent. However, intoxication is no excuse for failure to act as a reasonably prudent person would act. An intoxicated person is held to the same standard of care as a sober person.

The taking of one or more drinks of alcoholic liquor is not of itself illegal and does not necessarily constitute negligence. The circumstances and the effect must be considered; and whether or not a person was intoxicated at a certain time is a question of fact for the jury to decide.

A person is under the influence of intoxicating liquor when, as a result of drinking thereof, his nervous system, brain or muscle is so affected as to impair to an appreciable degree his ability to operate the vehicle in a manner like that of an ordinarily prudent person in full possession of his faculties, using reasonable care, and under like conditions.<sup>70</sup>

**Idaho**

It is unlawful for any vehicle to be moved, run, or operated on the highways of this state by any person unable to control and properly operate the same with due regard to the safety of the public and other vehicles; and in all cases any person in a state of intoxication is deemed conclusively to be unable to control and operate a vehicle. And if you find from the evidence that the defendant was, at the time of the accident, in a state of intoxication, then under the law he is conclusively deemed to have been unable to control and operate the automobile which he was driving.<sup>71</sup>

**Oregon**

It is further charged in the complaint [defendant had counter-claimed] that plaintiff attempted and undertook to drive his automobile and was attempting to drive and was propelling the same along said highway at and when he was under the influence of liquor and so intoxicated that he could not steer and operate

<sup>70</sup> *Zamucen v Croker*, 149 Cal App2d 312, 308 P2d 384

<sup>71</sup> *Packard v O'Neil*, 45 Idaho 427, 262 P 881, 56 ALR 317

said automobile and could not appreciate and understand the position in which his automobile should be upon the highway.

An Oregon statute provides that: "It shall be unlawful and punishable \* \* \* for any person who is \* \* \* intoxicated or under the influence of intoxicating liquor \* \* \* to drive any vehicle upon any highway, street or thoroughfare within this state" [ORS 483 992].

If it appears that the plaintiff violated this section of the statute, that would be negligence in and of itself <sup>72</sup>

#### Virginia

The court instructs the jury that an automobile in the possession of and driven by a person under the influence of intoxicants is a dangerous instrumentality. And the law places the duty on an owner of an automobile to use due care in preventing such use of said car, when the owner knows or has reason to know that one who has been operating the same is addicted to intoxicants

And if the jury believe that J W. C knew or had reasonable cause to believe that his son, B C , was addicted to intoxicants, then he owed to the plaintiff and the public at large the duty of exercising due care to prevent the use of said car by his son

If you believe from the evidence that the plaintiff was injured as alleged in his notice, that the said injuries were caused by the negligent or unlawful act of the said B C., and if you further believe that the said B. C. was driving the automobile at the time of the accident in a reckless manner on account of being then and there under the influence of intoxicants, and if you further believe he was in the habit of getting under the influence of intoxicants for some time prior to the accident, and that his father, J W C , knew or had reasonable cause to know of the habits of his son, then he is liable for the acts of his son, while running said automobile under the influence of intoxicants, unless the jury believe from the evidence that J. W. C. took effectual means to prevent the use of his automobile by his son. <sup>73</sup>

#### Washington

The jury is instructed that to determine C.'s liability, whether he was negligent or not, depends upon how well his conduct conformed to the rules of law relating to drivers of automobiles. It is the law that no person while intoxicated

<sup>72</sup> Howe v Holger, 206 Or 293,  
291 P2d 731

<sup>73</sup> Crowell v Duncan, 145 Va 489,  
134 SE 576, 50 ALR 1425

shall operate an automobile on the streets of Seattle. If C. operated the auto in violation of, or without regarding any of the foregoing rules, then he is guilty of negligence; and if his negligence was the proximate cause of the collision, he would be liable.<sup>74</sup>

#### Wisconsin

You are instructed that the fact that M. O. H. was under the influence of liquor at the time he was struck by the Hanson car did not relieve said M. O. H. from his duty to exercise ordinary care and prudence for his safety. The intoxication of the deceased M. O. H. is not of itself negligence. It is only a circumstance to be weighed by the jury in determining whether or not the intoxicated person exercised ordinary care for his own safety.<sup>75</sup>

#### § 365. Age of operator.<sup>76</sup>

##### North Carolina

As I said before, violation of the law is itself *prima facie* negligence, *per se* negligence, but it is not that negligence which constitutes liability unless it becomes a proximate cause of the injury. So, in this case, the court charges you, if you find Miss D. was under 16 years of age and that she was driving the car, that was in violation of the law, and if you find that the violation was a proximate cause of the injury to the plaintiff's automobile, it would be your duty to answer the issue, "Yes."<sup>77</sup>

#### § 366. Sudden illness, dizziness, or disability of operator.

##### Arizona

You are instructed that the law as to drivers of motor vehicles is not different from that which governs other persons. The standard required is that of a reasonably prudent person under all the circumstances. If some unforeseen emergency or act of God occurs which overpowers the judgment of the ordinary careful driver, or renders him incapable of control of a motor vehicle, so that for a time he is not capable of independent action or any action in controlling a motor vehicle, and as a result injuries are inflicted upon another or his property, then such driver is not negligent.<sup>78</sup>

<sup>74</sup> Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 ALR 1132.

<sup>75</sup> Henrikson v. Maryland Casualty Co., 3 Wis2d 379, 88 NW2d 729.

<sup>76</sup> See also § 492, *infra*, Owner permitting incompetent operator

to drive

<sup>77</sup> De Laney v. Henderson-Gilmer Co., 192 NC 647, 135 SE 791.

<sup>78</sup> Pacific Employers Insurance Co. v. Morris, 78 Ariz. 24, 275 P2d 389.

**Wisconsin**

Now, gentlemen, if you find as a fact in this case that Mr. S, the driver, immediately before this car overturned—that is, at and immediately before this car turned into that creek or gully—was seized with an attack of epilepsy or dizziness, or that he suffered with some nervous trouble which made it impossible for him to manage the car—that is, which made it impossible for him to use the care which he owed to Miss K., the plaintiff,—and you find that his car overturned by reason of the fact that this man got a fit of epilepsy or dizziness, or some other nervous trouble with which he was suffering, and that that was the cause of the overturning of the car, then you must answer the three subdivisions of question one “No.” That is, if this man immediately before that car overturned, had his reason affected to such an extent that it was impossible for him to manage that car, then, of course, there was no failure to exercise ordinary care on his part, and if you find that to be the fact, you must answer each subdivision of question one “No.” <sup>79</sup>

**§ 366A. Operator falling asleep.**

The negligence complained of in the petition is that the defendant lost control of his car and allowed it to cross over the road to the left or wrong side and collide with a post. The defendant, in his answer, denies this charge. The burden is on the plaintiff to prove the charge by a preponderance of the evidence. The law requires the driver of an automobile to keep it under control and to proceed on the right of the center of the road in the direction in which he is going. If you find by a preponderance of the evidence that the defendant did lose control of the car and that it did cross over to the left or wrong side of the road and collide with a post, then you should look to all the evidence in the case that may reflect on the cause of such action. The fact that an accident happens under such circumstances that it ordinarily would not have happened, had ordinary care been exercised, might raise an inference of negligence, which the jury is entitled to weigh and consider with all the other evidence as reflecting on the charge of negligence. [If you find by a preponderance of the evidence that defendant lost control of said car by going to sleep, that would create an inference of negligence, the weight of which would be for you to consider and determine, and in such event you will then consider whether or not, from the evidence, the defendant has met or explained the circumstances of such act, and the weight to be given to

<sup>79</sup> *Kaboth v Schrewe*, 211 Wis 280, 247 NW 835

such explanation, if any, is also for your determination. If you find, from a preponderance of the evidence, that there was negligence on the part of the defendant in falling asleep and losing control of the car, if you find that he did so, you will then consider whether or not such negligence was the proximate cause of the collision and of whatever injuries you may find plaintiff to have suffered. If you find from a preponderance of the evidence that such negligence, if any, was the proximate cause of the plaintiff's injuries, if any, then she would be entitled to recover for such injuries, if she did not by her own negligence contribute to cause the collision and resulting injuries.] It is your duty to weigh and consider all the evidence on both sides, and then if you find that the plaintiff has proven by a preponderance of the evidence her charges of negligence and that such negligence was the proximate cause of the collision, then plaintiff would be entitled to recover her damages for any injuries she suffered if she is free from negligence on her part that proximately contributed to produce her injuries.<sup>80</sup>

### § 367. Operator stung by insects.

The mere fact that the car left the highway and hit the tree raised a presumption of negligence upon the part of the driver,

<sup>80</sup> Collins v McClure, 143 OhSt 569, 56 NE2d 171

In the case cited, judgment on verdict for plaintiff was reversed on account of error of the trial court in giving the following instruction

"If you find by a preponderance of the evidence that defendant lost control of said car by going to sleep, that would be negligence, and if such negligence were the proximate cause of the collision with the post, and plaintiff was injured, she can recover for her injuries if she did not by her own negligence contribute in any degree to cause the collision"

The court said that the authorities are quite uniform upon the proposition that "the fact that a driver went to sleep while driving an automobile creates an inference of negligence sufficient to make out a prima facie case, and sufficient for a recovery of damages by one injured as a result thereof, if no

circumstances tending to excuse or justify his conduct are proven" It was also said that the record disclosed evidence from which the jury would have been warranted in finding negligence, but "that was a question of fact for the determination of the jury"

The Supreme Court also said that the trial court in the general charge "in appropriate terms accorded the plaintiff the full benefit of the res ipsa loquitur doctrine"

That part of the language in the instruction as given here has been supplied, as it conforms to the Ohio rule on the doctrine of res ipsa loquitur

In the case cited, the plaintiff was a passenger in the automobile driven by the defendant. The accident occurred in the state of Kentucky, where the so-called "Guest Statutes" did not exist. There was evidence to the effect that defendant had been working long hours, and that the car left the road and



standing alone and unexplained, and constitutes *prima facie* evidence of the negligence of B. It then became the duty of the defendant B. and of Miss G. to go forward with their evidence and show why the car left the highway, why it rammed the tree, and that it did so without any fault or negligence upon the part of B. Of course, speed alone is not the only reason an automobile may leave a highway. A bee, flying into a window of a car, alighting upon the driver's face, and his frantic effort to get rid of the bee might result in a car trying to climb a telegraph pole, and there are many other reasons which suggest themselves to you as to how it might be that a car might leave the highway. Some part of the mechanism might go wrong. B. was driving the car; presumably he knows why the automobile left the highway; he is silent; he does not tell us why it did, and so we come back to the presumption of negligence to which I have already referred.<sup>81</sup>

### § 368. Identity of operator.

#### Connecticut

There is evidence in the case from which you may reasonably come to the conclusion that K. was the operator of the defendant's automobile at the time of the collision.<sup>82</sup>

#### Maryland.

The jury are instructed that, if the minds of the jury are left by the evidence in a state of even balance as to whether it was an automobile in charge of defendants' chauffeur that was the cause of the accident, then their verdict must be for the defendants.<sup>83</sup>

#### Missouri.

The court instructs the jury that the burden of proof is on the plaintiff to prove to your reasonable satisfaction by the preponderance or greater weight of the credible testimony that defendant, H. H. K., was operating the automobile which collided with the one in which plaintiff was riding and this burden of proof continues and abides with plaintiff throughout the entire trial; and unless you find and believe from the evidence in the case that plaintiff has proved to your reasonable satisfaction by the preponderance of the credible testimony that defendant,

struck a post, probably by reason of his falling asleep. The evidence also tended to show that the plaintiff was asleep in the back seat at the time of the accident

<sup>81</sup> Galbraith v Busch, 267 NY

230, 196 NE 36

<sup>82</sup> Smith v Firestone Tire & Rubber Co., 119 Conn 483, 177 A 524

<sup>83</sup> Epstein v Ruppert, 129 Md 432, 99 A 685

H H K., was operating said automobile on the occasion mentioned in evidence, then your verdict must be in favor of defendant H. H K

The court instructs the jury that before you can find a verdict in favor of the plaintiff in this case, you must find and believe from the evidence that the defendant, H. H. K., operated the ——— automobile mentioned in evidence at the time it was involved in a collision with the automobile in which plaintiff was riding and if you find and believe from the evidence that on said occasion said H H K was not operating said automobile, then your verdict must be in favor of defendant.<sup>84</sup>

### § 369. Identity and ownership of vehicle.

#### Alabama.

If the jury are reasonably satisfied from the evidence that an automobile truck collided with an automobile of plaintiff on a public street in the city of Birmingham, to wit, First Avenue, at or near its intersection with Seventy-Fourth Street, in the city of Birmingham, Alabama, and that the said truck at the time bore the license number —, and that upon the record of automobile licenses in the probate judge's office of Jefferson County, Alabama, said number appeared as the license number of a certain truck for the year 19—, and that upon said record one of the defendants, to wit, C W F, appeared as the owner of said truck, then these facts would be presumptive evidence that the said truck was the property of said defendant, and that it was still his property at the time of the collision, and that the person in charge of and operating it was his servant or agent.<sup>85</sup>

#### Missouri

If defendant's automobile was in his garage and was not being driven and operated by him at the time and place plaintiff claims to have been injured, the verdict should be for defendant<sup>86</sup>

### § 370. Effect of violation of statute generally.

#### Arkansas

(1) The jury are instructed that neither the traffic statutes of this state nor the ordinances of the city of Ft Smith which have been introduced in evidence create any civil liability against the defendants, and are only to be considered by the jury in

<sup>84</sup> Rath v Knight (Mo), 55 SW2d 96 S 349

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<sup>86</sup> Schmitt v Shuplak (MoApp),

<sup>85</sup> Ford v Hankins, 209 Ala 202, 42 SW2d 959

passing upon the question as to whether there was negligence upon the part of either plaintiff or defendants.<sup>87</sup>

(2) The court in these instructions has referred to certain traffic laws of Arkansas. If you find that any party or parties violated any traffic law or laws as defined in these instructions, such violation, if any, does not constitute negligence in and of itself, but is only evidence for you to consider, along with all other evidence in the case, in determining whether such party was guilty of negligence.<sup>88</sup>

#### California.

(1) Driving an automobile in violation of the California Vehicle Act is negligence, and if such negligence proximately causes injury, and if the plaintiff is not contributorily negligent, plaintiff without further proof of negligence may recover.<sup>89</sup>

(2) While a violation of law constitutes negligence, this will not prevent recovery by a plaintiff unless such violation was a proximate cause of the injury.<sup>90</sup>

(3) When the plaintiff's act or omission in violation of a statute or ordinance which contributes to his injury is itself caused by the negligence of the defendant, the negligence of the plaintiff will not be regarded as the proximate cause of the damage.<sup>91</sup>

(4) While it may happen that prudence and safety of life or limb require the doing of an act which would otherwise be a violation of law, and liability therefor may be avoided by showing that under the circumstances of the particular case the violation was justifiable or excusable, such violation is only excusable when it results from causes or things beyond the control of the person charged therewith. In the absence of an overruling necessity, the duty to comply with the law is not affected by the reasonableness of its requirement as applied to given circumstances.<sup>92</sup>

#### Connecticut

The legislature, with unquestionable authority, has established an arbitrary standard for the test of conduct in operat-

<sup>87</sup> Pollock v Hamm, 177 Ark 348, 6 SW2d 541. See also Coca-Cola Bottling Co v Doud, 189 Ark 986, 76 SW2d 87.

<sup>88</sup> Woodruff Electric Co-operative Corp v Weis Butane Gas Co, 225 Ark 114, 279 SW2d 564.

<sup>89</sup> Musante v Guerrini, 125 Cal App 556, 13 P2d 965.

<sup>90</sup> Riley v Berkeley Motors, Inc, 1 CalApp2d 217, 36 P2d 398. See also Hart v Farris, 218 Cal 69, 21 P2d 432.

<sup>91</sup> Riley v Berkeley Motors, Inc, 1 CalApp2d 217, 36 P2d 398.

<sup>92</sup> Morris v Purity Sausage Co, 2 CalApp2d 536, 38 P2d 193.

ing motor vehicles in the highways of this state. It has prescribed that certain acts, plainly stated or specifically defined, shall not be done. A violation of the statute is a violation of the duty which one person owes to another in respect of persons or property, and therefore is negligence of itself, and when it is the proximate cause of injury, it is actionable negligence.<sup>93</sup>

#### Delaware

The violation of a statute is an act of negligence per se, and if the jury believe that the defendant, by his servant, was violating either provision of the statute referred to, then the defendant would be liable in this action, provided such negligence was the cause of the accident and the plaintiff's own negligence did not contribute thereto.<sup>94</sup>

#### Georgia

(1) These traffic regulations which I have just given you as the law of this state applicable to this case, that is, applicable to the pleadings and evidence, are put down as directions under law and a violation of any one or more of them would constitute what is called negligence per se, that is, negligence as a matter of law without further proof of negligence than a violation of such traffic law or regulation.<sup>95</sup>

(2) The failure of the defendant to comply with a law made for the plaintiff's protection does not excuse the plaintiff's violation of a law made for the defendant's protection.<sup>96</sup>

#### Idaho

The laws of the road of Idaho govern the use by vehicles on highways, as defined in such laws. You are instructed that a violation, by a user of such a highway, of the laws of the road which causes or contributes to an injury to another user constitutes negligence, for which the first party is liable to the party injured in damages.

This is subject to the qualification that where the statute states that a violation of a particular law of the road is only prima facie unlawful, a violation of such law would be only prima facie negligence.<sup>97</sup>

#### Kansas

A violation of the statute which results in an injury to another is negligence as a matter of law.<sup>98</sup>

<sup>93</sup> Lukosevicia v Bartow, 99 Conn 723, 122 A 709

<sup>94</sup> Grier v Samuel, 4 Boyce (27 Del) 106, 86 A 209

<sup>95</sup> Rutledge v Crowe, 91 GaApp 795, 87 SE2d 242

<sup>96</sup> O'Farrell v Templeman, 39 Ga App 222, 146 SE 914

<sup>97</sup> McCoy v Kregel, 52 Idaho 626, 17 P2d 547

<sup>98</sup> Fisher v. O'Brien, 99 Kan 621, 162 P 317, LRA 1917F, 610

## Michigan

Under the law of this state, a person who operates his automobile upon the highway in violation of the law, is guilty of negligence per se. In order that an injured plaintiff shall reap the advantages arising from the fact that defendant has violated the provisions of the motor vehicle law, and is deemed guilty of negligence, it is essential that the injury of which the plaintiff complains is one which proximately follows the violation of the regulation. If the violation is the proximate cause of the injuries sustained by the plaintiff, the defendant would be liable.<sup>99</sup>

## Minnesota

[After reading some of the traffic statutes]

The violation of any such law or statute is prima facie evidence of negligence. Prima facie means that it is not conclusive and that it is only controlling in the absence of other evidence which repudiates the assumption that such acts are not reasonable and prudent. If you find, considering the conditions of the highway, weather conditions and all other conditions then existing, that the defendant violated any of the laws I have mentioned [and in the absence of other evidence which repudiates the assumption that such acts were not reasonable and prudent], or [if you find] that the defendant failed to exercise the care an ordinarily prudent person would exercise in the circumstances, then it would be your duty to find the defendant is [was] negligent.<sup>1</sup>

## New Jersey.

The court instructs the jury that a violation of the Motor Vehicle Act and of the Traffic Act does not of itself constitute negligence. These statutes carry their own penalties, but what our courts have said is this. These acts, these statutes, constitute warnings to people operating motor vehicles, that it is dangerous to act other than in accordance with those statutes, those rules, which the legislature has laid down for the guidance

<sup>99</sup> Breen v Smart, 251 Mich 679, 232 NW 226

<sup>1</sup> Benson v Hoening, 228 Minn 412, 37 NW2d 422

In the case cited, judgment on verdict in favor of plaintiff for damages on account of personal injuries was affirmed.

Objection was made to the last sentence of the instruction given here, absent the language in

brackets. The court said, "Reading that portion alone, the instruction would be incorrect, \* \* \* but by reading the whole instruction together we believe that the jury would not be misled." The language within the brackets, inserted by the editor, should cure any objection to the instruction.

of the drivers of motor vehicles, and danger reasonably to be foreseen is a test of negligence <sup>2</sup>

#### North Carolina.

The court further instructs you that a violation of a section of a statute made and intended for the protection of life and property on a highway is negligence and that if it is the proximate cause of an injury, the proximate cause of damage, it is actionable negligence <sup>3</sup>

#### Ohio

If you find that either of the parties violated either the law of the state or the ordinance of the city of Cincinnati, which law and which ordinance have been read to you, then that would be negligence as a matter of law <sup>4</sup>

#### South Carolina

Gentlemen of the jury, having defined to you common law negligence, I tell you that negligence is negligence wherever you find it and in whatever class it may fall. If the legislature has said that you and I must conduct ourselves in a certain way in the public highway in the operation of an instrumentality, and we violate that law, the law says that the very fact of the violation is itself negligence, it is negligence per se, negligence as a matter of law, negligence because the law says we must conduct ourselves in a certain way, and if we fail to do it inadvertently or consciously, we are guilty of a wrong, and if that wrong is the direct and proximate cause of an injury to somebody else, we are responsible for it <sup>5</sup>

#### Texas

The violation of a statutory duty is negligence per se <sup>6</sup>

#### Utah

Actionable negligence may not be predicated on a failure to have lights, or to sound the horn, or to drive a car in violation of an ordinance or statute, unless such unlawful or negligent acts, or some of them, constitute the proximate cause of the injury <sup>7</sup>

<sup>2</sup> Doyon v Massoline Motor Car Co 98 NJL 540, 120 A 204

<sup>3</sup> Murphy v Asheville-Knoxville Coach Co, Inc, 200 NC 92, 156 SE 550

<sup>4</sup> Horwitz v Eurove, 129 OhSt 8 193 NE 644, 96 ALR 782 See also Swoboda v Brown, 129 OhSt 512, 196 NE 274

<sup>5</sup> Parker v Simmons, 163 SC 42, 161 SE 169

<sup>6</sup> Dixie Motor Coach Corp v Galvan (TexCivApp), 56 SW2d 268, set aside (TexComApp), 126 Tex 109, 86 SW2d 633

<sup>7</sup> Wilcox v Wunderlich, 73 Utah 1, 272 P 207

### Washington

(1) If you find from a preponderance of the evidence that plaintiff operated his automobile at the time and place of the collision in violation of the ordinances of Spokane, or of the laws of the state as you have been instructed, such operation would be of itself negligence <sup>8</sup>

(2) You are instructed that any violation of any of the statutory requirements may be considered by you as evidence of negligence, but before you would be justified in finding a verdict against the defendants on account of such negligence, you should also be convinced by a fair preponderance of the evidence that the violation of the statute was the proximate cause of the injury <sup>9</sup>

### Wisconsin

Regulations are provided by statute for the safe operation of automobiles on public highways. Any automobile operator who disobeys any of the statutory regulations under such circumstances that he ought reasonably to foresee that such disobedience might probably result in personal injury or damage is guilty of negligence. In other words, every one is required to observe and keep the rules provided by statute for the operation of automobiles upon public highways <sup>10</sup>

## § 371. — Brakes.

### California

[After reading to the jury § 670 (a) of the Vehicle Code of California, with respect to brakes, the court instructed the jury.] Conduct which is in violation of § 670a of the Vehicle Code of the state of California, just read to you, constitutes negligence per se. This means that if the evidence supports a finding, and if you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected

<sup>8</sup> Child v Hill, 155 Wash 133, 283 P 1076. See also Edwards v Lambert, 121 Wash 380, 209 P 694, Barlett v Powers, 158 Wash 270, 290 P 816.

<sup>9</sup> Simonson v Huff, 124 Wash 549, 215 P 49.

These two instructions, although approved by the Washington Su-

preme Court, seem to be inconsistent. No 1 makes a statute violation negligence per se, while No 2 makes the violation only evidence of negligence.

<sup>10</sup> Simac v Darrow, Circuit Court, Vilas County, Wisconsin, see 206 Wis 668, 240 NW 148, 149.

from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law, and will do so unless causes not of his own intended making induce him, without moral fault, to do otherwise.<sup>11</sup>

#### Georgia

The law requires motor vehicles while in use upon the public streets to be equipped with efficient and serviceable brakes; and the operation of the truck along the public streets not so equipped constituted negligence per se.<sup>12</sup>

#### Indiana

(1) If you find from the evidence that Mr. S. operated an automobile at the time of the collision in violation of this statute [§ 47-2228, Burns' 1952 Replacement], knowing the condition of his brakes to be bad, then such conduct on his part, if any, constituted negligence. Or if you find from the evidence that Mr. S.'s automobile was equipped with adequate brakes immediately before he attempted to apply his foot brake upon approaching the intersection and that his foot brake failed completely to stop or slow down the automobile without any advance warning of such failure to Mr. S., and that he failed to exercise reasonable care by applying his emergency or hand brake in an effort to avoid the collision and that such conduct on his part, if any, was the sole proximate cause of the collision then Mrs. S. would not be entitled to recover herein.<sup>13</sup>

(2) A statute of the state of Indiana in full force and effect at the time of the collision, provided that every motor vehicle, other than a motorcycle, when operated on a public highway in this state, shall be equipped with brakes adequate to control the movement and to stop and hold such vehicle. I instruct you that if you find from a fair preponderance of the evidence, that at the time of the collision, the defendant's employee, B. L., was operating upon a public highway, a motor vehicle, which was not equipped with brakes adequate to con-

<sup>11</sup> *Merry v. Kundsén Creamery Co.* 94 CalApp2d 715, 211 P2d 905.

The instruction set forth here was held proper, but judgment for defendant was reversed on account of error in other instructions, upon return of the jury for further instructions.

The definition given by the court as to "negligence per se," is, in

general, the definition of "prima facie negligence." The language contained in the last sentence, "without moral fault," might also be questioned.

<sup>12</sup> *Orange Crush Bottling Co. v. Smith* 35 GaApp 92, 132 SE 259.

<sup>13</sup> *Stull v. Davidson*, 125 IndApp 565, 127 NE2d 130.



trol its movement and to stop and hold it, then the defendant was guilty of negligence.<sup>14</sup>

#### Michigan

[After reading statute with respect to brakes.]

I instruct you, members of the jury, that that is the provision of the motor vehicle law as to brakes, and also as to stopping within the assured clear distance ahead, and speed. As to violation of the provisions of the motor vehicle law, we commonly call that negligence, negligence per se.<sup>15</sup>

#### Oregon

A statute provides \* \* \* that every motor vehicle \* \* \* shall be provided with two sets of brakes operating independently, sufficient to control the vehicle at all times. You are instructed that any violation of this law would be negligence in itself.<sup>16</sup>

### § 372. — Lights.<sup>17</sup>

#### Alabama

The law of the state requires that when a truck or motor vehicle is parked on the highway it shall be equipped with lights as defined to you by the court, and if the defendant company parked this truck on the highway in a manner contrary to law in violation of the Highway Code of Alabama, then the law says it was negligent as a matter of law. In other words, violation of the law with reference to the operation of motor vehicles on the highways of Alabama, or contrary to the laws of Alabama, with reference to motor vehicles, makes it guilty of negligence per se. The law takes away from you the right to say whether it was negligence on the part of the defendant to park the truck without complying with the law. If they did not comply with the law with reference to parking trucks on the highway, then the law says that they were negligent per se.<sup>18</sup>

#### Delaware

The plaintiffs contend that the defendant at the time of the accident had stopped its motor vehicle on the paved portion of the public highway known as the DuPont Boulevard, in violation of the statutes of this state. If it had, then we say to you that such violation would constitute negligence on the part of

<sup>14</sup> Gary Fish Co v Leisure, 122 IndApp 190, 102 NE2d 209

<sup>15</sup> Black v Ambs, 307 Mich 644, 12 NW2d 381

<sup>16</sup> Daniels v Riverview Dairy, 132

Or 549, 287 P 77

<sup>17</sup> See also § 356, *supra*

<sup>18</sup> Newell Contracting Co v Berry, 223 Ala 111, 134 S 868

the defendant, and it would be liable in this action, if such negligence was the cause of an accident and the plaintiffs' own negligence did not contribute thereto. The defendant contends that it violated no statute, but that if there was a violation of the statute, whether, as alleged by the plaintiffs, no red light projected from the rear of the truck, or because a lookout was not maintained, nevertheless such violation did not cause the accident because there was sufficient daylight to enable the plaintiffs to see the truck standing in the road. It is for you to say whether there has been a violation of any statute, and if so, whether such violation did cause the accident.<sup>19</sup>

#### Indiana.

The jury are instructed that it is one of the purposes of the statute of the state of Indiana referred to in the foregoing instructions to require those who own or control motor vehicles to place lights upon them during the time set forth in the statute when being used upon the streets and public highways of the state so as to furnish a warning to other people in making use of such public highways, and that a violation of that provision of said statute constitutes negligence.<sup>20</sup>

#### Michigan

Now, I will charge you if plaintiff did not have his headlights on, that as a matter of law he was guilty of negligence, because the law provides that a driver who is driving during the hours of darkness must have his headlights on, and it is negligence, too, as a matter of law to drive on dark streets without your headlights on. [If such failure to have his headlights on, in the event he did not have them on, was a proximate cause of, or proximately contributed to, the collision] he cannot recover because he would be guilty as a matter of law of [contributory] negligence on his own account.<sup>21</sup>

#### Utah.

Actionable negligence may not be predicated on a failure to have lights, or to sound the horn, or to drive a car in violation

<sup>19</sup> *Island Exp., Inc. v. Frederick*, 5 W. W. Harr. (35 Del.) 569, 171 A. 181.

<sup>20</sup> *Koplovitz v. Jensen*, Superior Court, Lake County, Indiana, No. 19928, see 197 Ind. 475, 151 NE 390.

<sup>21</sup> *Vukich v. Detroit*, 318 Mich. 515, 28 NW2d 894.

In the case cited, which involved collision between plaintiff's car and a city motor bus, judgment on verdict finding no cause of action was

reversed on account of error in the court's charge, *inter alia*. That part of the instructions within the brackets was not included in the instructions as given. The instruction was held erroneous because "there must have been some causal connection between the accident and the absence of (plaintiff's) headlights in order to make such negligence proximate and contributory."

of an ordinance or statute, unless such unlawful or negligent acts, or some of them, constitute the proximate cause of the injury.<sup>22</sup>

§ 373. — Horn, bell, or other signaling device.<sup>23</sup>

Indiana.

You are instructed that at all times complained of in plaintiff's complaint there was a statute of the state of Indiana in full force and effect and binding upon the parties, which provided in part as follows "No person shall \* \* \* turn a vehicle from a direct course on a highway unless and until such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement"

So, in this case, if you find from a fair preponderance of the evidence that the defendant violated the provisions of this statute, he was guilty of negligence as a matter of law and if you further find from a fair preponderance of the evidence that the defendant's violation of this statute, if any, proximately caused the plaintiff's injury and resulting damages, if any, without fault or negligence on the part of the plaintiff, then under such circumstances, if any, your verdict must be for the plaintiff F. K.<sup>24</sup>

Minnesota.

(1) Every violation of positive law constitutes negligence. Consequently, if this car was being driven at an unlawful rate of speed, if the signals prescribed by the statute were not given, or if the car was driven on the left side of the road instead of the right, such violation would constitute negligence.<sup>25</sup>

(2) Now, we have a statute which provides:

[Reading M. S. A. § 169.19, subd 6]

The methods of signaling are as follows:

[Reading M. S. A. § 169.19, subd 7, and M. S. A. § 169.57]

Under the circumstances of this case no signal was required of and by the driver of the S O truck by his hand or hand and

<sup>22</sup> Wilcox v Wunderlich, 73 Utah 1, 272 P 207

<sup>23</sup> See also § 357, *supra*

<sup>24</sup> Larkins v Kohlmeyer, 229 Ind 391, 98 NE2d 896. It should be noted that the court said this instruction was proper when there

is no evidence of any fact which would tend to excuse the violation of the statute

<sup>25</sup> McMahon v Flynn, 154 Minn 326, 191 NW 902

arm extended to one side if his signal lamp was operating properly.

If from the evidence you find that the S O Co driver did suddenly stop or suddenly decrease the speed of his car and that at that time there was a vehicle immediately in the rear and that the S O Co's driver failed to give the required signal either by hand or arm or by a signal light on the rear of his truck, then the defendant S O Co would be guilty of prima facie negligence and you could find the S O Co negligent in the absence of reasonable excuse or justification for said act.

If, however, you find that defendant S O Co. driver did not stop or suddenly decrease the speed of the truck while there was a vehicle immediately to the rear, then there was no violation of said statute and no claim of negligence against the S O Co could be based upon any claimed violation of this particular statute. The test would not be the driver's belief that his statutory violation was in the best interests of safety but rather whether, in the light of all the facts and circumstances, his action in violating the statute in the interests of safety were such as would have been taken by an ordinarily prudent and careful person acting under the same or similar circumstances <sup>26</sup>

#### Nebraska

A motorist is required by law in the state of Nebraska to have his car equipped with a horn or other suitable warning device. The statute contemplates the use of this warning device to warn pedestrians or other travelers who may be in the path of an approaching car. A person entering a public highway or crossing a public highway where his view is obstructed should not only slow down, but should give a timely signal with his horn or other signaling device. If the jury find from the evidence that the person in charge of defendant's automobile was backing the same with her vision obscured as to that part of the public sidewalk where plaintiff was walking and failed to give a timely signal with her horn or other signaling device, and in consequence thereof ran into and injured plaintiff, then the fact that defendant did not see plaintiff does not excuse her, and said defendant was guilty of negligence <sup>27</sup>

#### Utah

Actionable negligence may not be predicated on a failure to have lights, or to sound the horn, or to drive a car in violation

<sup>26</sup> *Leman v Standard Oil Co., of Indiana*, 246 Minn 271, 74 NW2d 513  
<sup>27</sup> *Chew v Coffin*, 144 Neb 170, 12 NW2d 839

of an ordinance or statute, unless such unlawful or negligent acts, or some of them, constitute the proximate cause of the injury.<sup>28</sup>

#### Washington

I instruct you that the laws of the state of Washington, at the time of the accident, provided as follows

[Wash Rev Code, § 46 60 040 ]

If you find from the evidence in this case that the plaintiffs started or attempted to pass the school bus without giving the signals provided by this law, then the plaintiffs were guilty of negligence, because it is the law that a violation of a positive traffic provision is in itself negligence, and if you further find that such negligence caused or contributed to the accident, then the plaintiffs can not recover and your verdict must be for the defendant<sup>29</sup>

### § 374. — Flags on articles extending from vehicles.

#### Oregon

I will state to you that it is the law of the state of Oregon that it is incumbent upon one who operates a vehicle, if the vehicle is overloaded so that the overload extends a distance of four feet or more from the rear of the vehicle—and the court makes a construction that this relates to four feet from the body of the vehicle—such extension must be protected by a flag in daytime and a light at night That is for the protection of other operators of vehicles and pedestrians It would be negligence in and of itself, per se, if a violation of that should proximately cause an accident<sup>30</sup>

### § 375. —Age of operator.<sup>31</sup>

As I said before, violation of the law is itself *prima facie* negligence, per se negligence, but it is not that negligence which constitutes liability unless it becomes a proximate cause of the injury So, in this case, the court charges you, if you find Miss D was under 16 years of age and that she was driving the car, that was a violation of the law, and if you find that that violation was a proximate cause of the injury to the plain-

<sup>28</sup> Wilcox v Wunderlich, 73 Utah 1, 272 P 207

<sup>29</sup> Farmer v School Dist No 214, 171 Wash 278, 17 P2d 899

<sup>30</sup> Riley v Good, 142 Or 155, 18

P2d 222 The number of feet has been changed to four feet to conform with present statutes

<sup>31</sup> See also § 365, *supra*

tiff's automobile, it would be your duty to answer the issue, "Yes" <sup>32</sup>

### § 376. — Right of way at intersections. <sup>33</sup>

#### California.

The law of this state in force at the time of this accident, provides as follows [Section 550 of the Vehicle Code]. "When two vehicles enter an intersection from different highways at the same time, the driver on the left shall yield the right of way to the driver of the vehicle on the right"

If you find that Mrs H did not comply with the above provisions of the Vehicle Code, and that her failure to comply with such provisions was the sole proximate cause of this accident, then I instruct you that your verdict must be in favor of the defendants. <sup>34</sup>

#### Georgia

I charge you that the traffic laws of the state of Georgia provide that an operator of another vehicle who is approaching from the left on an intersecting highway shall give the right of way to the operator of a vehicle approaching from the right on an intersecting highway I charge you that this traffic law is applicable not only to state highways but also to public streets within the limits of cities The driver of a vehicle having the right of way at a highway or street intersection, ordinarily has the right to assume and to act upon the assumption that drivers of cars approaching the intersection on his left will yield the right of way and also that they will exercise the ordinary care required of them. This state law that at an intersection the driver on the right shall have the right of way is not limited to two vehicles coming to an intersection simultaneously or practically so, but is applicable to any situation where the distances between the two vehicles, their relative speeds or any other circumstances show that the driver on the left should reasonably apprehend a collision would occur unless he yielded the right of way If you should believe from the evidence that L H was approaching the intersection from the defendant's left and that the defendant was approaching said intersection from L H's right simultaneously, or practically so, or that the distances between the two vehicles, their rela-

<sup>32</sup> DeLaney v Henderson-Gilmer Co, 192 NC 647, 135 SE 791

<sup>33</sup> See also § 350, *supra*, and § 457, *infra*

<sup>34</sup> Howard v National Ice Cream

Co, 115 CalApp 639, 2 P2d 211  
The language of the statute has been changed to conform to the latest provision

tive speeds and the other circumstances showed that L H should have reasonably apprehended a collision would occur unless he yielded the right of way, and if you further believe from the evidence that L H failed to yield such right of way, then L H. would be guilty of negligence per se, and if you believe that such negligence per se was the sole proximate cause of the collision, then I charge you that the plaintiff cannot recover against L C. L <sup>35</sup>

Indiana.

The court instructs the jury that when two vehicles enter an intersection at the same time, the one on the left shall yield the right of way to the vehicle on the right; but, however, when one vehicle has already entered the intersection and the other vehicle has not, then the vehicle which entered the intersection first has the right of way over the other. And if you find from a fair preponderance of the evidence in this cause that the plaintiff's truck entered the intersection first and before the automobile entered said intersection, then the plaintiff had the right of way and the right to proceed across the intersections.

[After referring to right-of-way statutes ]

You are further instructed that it was the duty of both the plaintiff and the defendant's employee to obey and comply with these statutes, and that the violation of any of the provisions of said laws by either of them would constitute negligence as a matter of law, and in this case, if you should find from the evidence that the defendant, by its employee, negligently drove and operated the defendant's automobile in violation of either or both of said laws as alleged in the plaintiff's complaint, and that such negligent and unlawful act, if any, was the sole proximate cause of the plaintiff's injuries and damage, if you find that he was injured and damaged, then your verdict should be for the plaintiff, and, in like manner, if you find from the evidence that the plaintiff negligently drove his truck in violation of either or both of said laws, and that such negligent and unlawful act, if any, proximately caused or contributed to produce the injuries and damage complained of, then your verdict should be for the defendant.

In this connection, however, you are further instructed that the right-of-way statute and other statutes enacted by the legislature for the guidance of motorists in the operation of

<sup>35</sup> Harrison v League, 93 GaApp 718, 92 SE2d 595

motor vehicles on the public highways were enacted as safety measures to guard against the danger of collision between automobiles, and the rules announced by such statutes are not unyielding under any and all circumstances, and they must be applied in each instance in the light of the facts and circumstances involved in the particular case under investigation. The driver of an automobile upon a public highway in this state should exercise reasonable care in its operation, and not assume that because the rules announced by the courts or statutes enacted by the legislature give him certain rights and preferences, he can avail himself thereof with apparent indifference to the safety and rights of other persons using the public highways. The statutory right of way given to the vehicle which has already entered the intersection over a vehicle approaching the intersection from a different highway is not an absolute one; neither is the statutory right of way given to a vehicle on the right over the driver of a vehicle on the left, where two vehicles enter the intersection from different highways at the same time, an absolute right.

The court instructs you that the driver of a vehicle lawfully using a public highway has the right to assume that others using it in common with him will use ordinary care to avoid injuring him, and, in determining whether he can safely avail himself of the right to cross over the intersecting highway, he is not bound to anticipate a sudden violation of the statute or rule of the road by other persons using the highways which would involve a danger to him not then anticipated.<sup>36</sup>

#### Nebraska

The statutes of Nebraska further provide that a motor vehicle traveling upon a public highway shall give the right of way to vehicles approaching from the right, and shall have the right of way over those approaching from the left when said vehicles reach the intersection at approximately the same time, but the vehicle entering the intersection first shall have the right of way.

These statutes are for your information as to the law in the case, but if you find from the evidence in the trial that these statutes or either of them have been violated by either plaintiff or defendant, you are instructed that such violation is not in and of itself negligence, but you are instructed that it is a circumstance which you may take into consideration in determin-

<sup>36</sup> H E McGonigal, Inc v Etherington, 118 IndApp 622, 79 NE 2d 777.

In the case cited, judgment on verdict for plaintiff truck owner was affirmed.



ing whether or not the party so violating was guilty of negligence.<sup>37</sup>

§ 377. — Duty to stop at stop signs.

Alabama.

When a person enters these main highways, trunk highways of the state, it is his duty under the law to stop at that sign, and failure to stop would be negligence per se.<sup>38</sup>

Minnesota

Our arterial highways are protected by stop signs with which we are all familiar, and it was the duty of one approaching Highway No. 23 from the north at the place in question to stop at the entrance thereof and to yield the right of way to vehicles which had entered that intersection from the through highway or which were approaching so closely as to constitute an immediate hazard, the hazard of collision if both vehicles continued in their courses at the same speed. After stopping for an arterial highway, one seeking to pass through the intersection, after stopping and yielding in the manner I have just explained to you, has the right to proceed, and vehicles approaching the intersection by way of other highways must yield the right of way. It is the duty of one approaching an arterial highway to stop at a point where one may effectively observe traffic approaching on the arterial. In this instance as Y. B. approached Highway No. 23 at the time and place in question it was her duty under the law of this state to stop at the entrance to the highway and observe traffic approaching on that highway, and having stopped, if she did stop, and yielded the right of way to traffic approaching so closely as to constitute an immediate hazard, then she was at liberty to proceed onto or across Highway No. 23.

It is the claim of the plaintiff Y. B. that she stopped at some place to the north of Highway No. 23. Whether she stopped and where she stopped are questions of fact for you to determine. There are several pictures in evidence, three large ones and three small ones, which give you a clear view of the intersection in question. You will observe the stop sign in the pictures, and you will bear in mind what I have told you the law is, that a stop be made at the entrance to an arterial. That may or may not mean something other than stopping before coming to an arterial. The law does not say stop before coming

<sup>37</sup> Schrage v Miller, 123 Neb 266,  
242 NW 649

<sup>38</sup> Harris v Blythe, 222 Ala 48,  
130 S 548

to an arterial but to stop at the entrance to an arterial. If Y B did not stop in compliance with the rules of law I have given you, that would be prima facie evidence of negligence <sup>39</sup>

**Nebraska**

The statute requires one to come to a full stop as near the right of way line as possible before driving onto the state highway and to give the right of way to vehicles on such highway, regardless of direction, but does not require a driver to remain in that position until the highway is entirely clear of traffic, but, having complied with the rule to stop at a point where he can reasonably see, if it appears to him in the exercise of ordinary care that any traffic is so far away and proceeding at such speed that he could safely cross, he would not be negligent if he so proceeds and exercised ordinary care in doing so <sup>40</sup>

**§ 378. — Reserved.**

**§ 379. — Following too close to vehicle in front. <sup>41</sup>**

**California**

The court instructs you that the failure of any person to perform a duty imposed upon him by statute is negligence in itself. Therefore, should you find that the defendant, K M S, immediately prior to and at the time of the collision referred to in the complaint, violated the provisions of subdivision (a) of section 531 of the California Vehicle Code while operating the motor vehicle of the defendant, P G & E Co, by following the vehicle, in which the plaintiff, A M C, was riding, more closely than was reasonable and prudent, having due regard to the speed of such vehicles, the amount of the traffic, and the condition of the highway, his conduct in so doing would constitute negligence <sup>42</sup>

**Michigan**

In any action, in any court in this state, when it is shown by competent evidence that a vehicle traveling in a certain direction overtook and struck the rear end of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence

<sup>39</sup> Bohnen v Gorr, 234 Minn 71, 47 NW2d 459

<sup>40</sup> Bezdek v Patrick, 164 Neb 398, 82 NW2d 583

<sup>41</sup> See § 344, *supra*, and §§ 381, 461, 462, *infra*

<sup>42</sup> Coppock v Pacific Gas & Elec Co, 137 CalApp 80, 30 P2d 549

(Reading M. L. S. 1954, § 257.402)

These provisions are part of what is known as the Rules of the Road. Violation of any of the Rules of the Road, including those which I have given you is negligence per se, or in and of itself <sup>43</sup>

### § 380. — Driving on wrong side of highway

#### California

(1) It is negligence as a matter of law to violate a provision of the law, and therefore, if you believe from the evidence that the defendant M. violated the law by driving on the southerly or left-hand side of the road in a westerly direction, in the absence of any necessity therefor, then in such case it is your duty to find that the defendant M. is guilty of negligence. <sup>44</sup>

(2) I instruct you that one who violates a rule of law governing the use of a public highway as to how the passing of a vehicle shall be conducted, or the side upon which they shall pass each other, is guilty of negligence, and the one so violating any of these rules or attempting to pass a vehicle on a side other than is provided and prescribed by law assumes the burden of his experiment, and is liable for any injury that takes place by reason of or through such violation of the law, provided, however, that the party who has sustained the injury has not contributed to the injury. <sup>45</sup>

#### Connecticut

If you find that the defendant was on the left-hand side of the street when the collision occurred, he failed to perform a duty which he owed, by positive statute, to the plaintiff, and you should find him negligent in that one of the respects alleged in the complaint, unless you should find that he was coming into a side street from an intersecting street, and had not had time to get over to the right-hand side of the street <sup>46</sup>

#### Delaware

If the defendant's servant drove his automobile on the left or wrong side of the public highway, contrary to the statute, and the injury resulted therefrom without fault of the plaintiff, then the defendant is liable <sup>47</sup>

<sup>43</sup> Corbin v. Yellow Cab Co., 349 Mich. 434, 84 NW2d 775

<sup>44</sup> Olson v. Meacham, 129 CalApp 670, 19 P2d 527

<sup>45</sup> Weaver v. Carter, 28 CalApp

241, 152 P 323

<sup>46</sup> Irwin v. Judge, 81 Conn 492, 71 A 572

<sup>47</sup> Grier v. Samuel, 4 Boyce (27 Del) 106, 86 A 209

**Illinois.**

You are instructed that at the time and place in question there was, in full force and effect, the following statute of the state of Illinois

“Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway \* \* \*”

And if you find, from the greater weight of the evidence, that R. L. did not drive his vehicle on the right half of the roadway and that such conduct, if any, was negligent and directly caused injury to M. W. and L. B., then you should find R. L. guilty and award damages to M. W. and L. B., provided that you also find that M. W. and L. B. used ordinary care for their safety at and prior to the collision in question.<sup>48</sup>

**Iowa**

You are instructed that it is the law of this state that a person operating an automobile on the public highway, outside of cities and towns, may use any portion of said highway except upon meeting an automobile being operated in the opposite direction, and he should then yield one-half of said highway by turning to the right portion thereof, and remaining on said right portion until said automobiles have passed each other

A failure to so do would be presumptive evidence of negligence, but such presumption may be overcome by competent evidence to the contrary.<sup>49</sup>

**Michigan**

(1) Under the circumstances of this case, one who violates the law of the road by driving an automobile on the wrong side assumes the risk of such experiment; and if injury is caused thereby to another, then the driver driving on the wrong side of the road, having assumed the risk of such experiment, is guilty of negligence, and it would make no difference whether he was driving fast or slow.<sup>50</sup>

(2) The plaintiff also in his declaration alleges some seventeen or eighteen kinds of negligence, but you have heard the testimony and you understand the case now hinges on the claimed negligence of the driver of the oil transport truck in driving his truck on the south side of the road or in the right of way of the log truck in which plaintiff was riding, and in

<sup>48</sup> Borst v Langsdale, 8 IllApp2d 88, 130 NE2d 520

<sup>49</sup> Bachelder v Woodside, 233 Ia 967, 9 NW2d 464 The terms “pre-

sumptive evidence” and “prima facie evidence” are synonymous

<sup>50</sup> Marsh v Burnham, 211 Mich 675, 179 NW 300

turning to his left without giving proper warning and without using proper caution and failing to keep a lookout for possible approaching cars along the highway. These are the principal allegations of negligence.

The law is not so severe as to absolutely forbid one from turning to the left across the highway. If it did it would prohibit a man in the situation we have here, coming from the east, from driving into the gas station. Or to prohibit a man from driving in his own driveway if it happened to be on the left side of the road. So it does not forbid him to drive upon or across the off side, the left side, of the road; but it requires that he shall first see that the movement can be made in safety. And that is the governing element.

Now, on this question of stopping, or moving to the left side of the road, our courts have given this subject some construction, or these statutes some construction, and they have held that, assuming he can do so in safety and giving a reasonable warning, one driver may stop his car to relieve another driver in distress or to assist an injured person lying on the highway, and the like. But you understand this whole thing; the thing is that this driver must assure himself that he can make that movement in safety. That bears directly on the driver of the oil truck in this case. Perhaps it is not necessary for me to tell you, but I do tell you, that not only does the defendant admit that this oil truck was in the position I have described, but the defendant also admits that the driver of the oil truck was in its employ and in its truck with its consent and permission, and that it is responsible for any damage that may be caused by his neglect, if any.

There is another provision of the statute that rather indirectly bears on this case, and that is that outside the limits of any city or village it is unlawful to stop, park, or leave standing any vehicle on a main traveled part of a highway when it is practicable to stop or leave such vehicle off such part of the highway. That bears somewhat on the situation here, as to the duty of this driver to not leave his oil truck upon the highway. Now, so much I think I should say to you relative to the driving of the oil truck.

Violation of these provisions of the statute which I have now mentioned to you, by the defendant, would amount to negligence. That is, if he made those movements with which he is charged (turning left to opposite side of road), and admits

making, without ascertaining that the movements could be made in safety.<sup>51</sup>

#### Minnesota

Every violation of positive law constitutes negligence. Consequently, if this car was being driven at an unlawful rate of speed, if the signals prescribed by the statute were not given, or if the car was driven on the left side of the road instead of the right, such violation would constitute negligence<sup>52</sup>

#### Ohio

(1) If you find from a preponderance of the evidence that defendant, in overtaking and passing, or attempting to pass, the automobile being driven by J H at the time, drove his automobile to the left of the center line of S street when approaching within 100 feet of or traversing the intersection of S and H streets, a prima facie case of negligence of the defendant has been established. Prima facie evidence of a fact is such evidence as in the judgment of the law is sufficient to establish the fact, and if not rebutted remains sufficient for that purpose. It is such as establishes the fact, and unless rebutted or explained by the evidence becomes conclusive and is to be considered as if fully proved<sup>53</sup>

(2) The court says to you, as a matter of law, that the statute of the state of Ohio in force and effect on June 26th, 1932, provided as follows

[The court then quoted Gen Code §§ 6307-28 and 6307-29, with respect to a vehicle passing another. These are now Ohio Rev. Code, §§ 4511.28 and 4511.29.]

And I say to you further that if you find, by the greater weight of the evidence, that the defendant's driver in the operation of his taxicab at the time of this accident, did violate this statute, then the defendant would be guilty of negligence, and I say to you further that if you find such negligence was the sole, direct and proximate cause of the accident, then your verdict must be for the plaintiff<sup>54</sup>

<sup>51</sup> Samuelson v Olson Transp Co, 324 Mich 278, 36 NW2d 917

Plaintiff was riding as a guest in a truck which collided with the oil truck, which had turned left across the road, the driver of the log truck desiring to make some inquiry as to direction at a gas station

Judgment on verdict for plaintiff was affirmed

<sup>52</sup> McMahon v Flynn, 154 Minn 326, 191 NW 902

<sup>53</sup> See Jackson v Frederick, 152 OhSt 423, 89 NE2d 645

"Prima facie evidence" defined Gornien v Weidemer, 27 OCA 177, 29 CD 1

<sup>54</sup> Hunter v Brumby, 131 OhSt 443, 3 NE2d 353

(3) You are instructed that at the time of the collision in this case it was the duty of the defendant to maintain his car on the north half of the highway on which he was proceeding and if he failed to do so, he was then and there guilty of negligence as a matter of law <sup>55</sup>

#### Oregon

If you shall find from the evidence in this case that the defendant in turning north from Sandy Road into East Thirty-seventh Street did not go to and beyond the center of the intersection of said streets, then such act on his part would be a violation of the laws of this state, and if by reason of so failing to do he struck and injured plaintiff, he would be guilty of negligence. If you shall find from the evidence that at the time of the collision between plaintiff and defendant's car the defendant was operating his car on the left or west side of East Thirty-seventh Street, then I instruct you that such act was a violation of the laws of this state, and the defendant would be guilty of negligence, and if by so doing injured the plaintiff, he is guilty of negligence <sup>56</sup>

#### Tennessee.

I instruct you, gentlemen of the jury, that it is the duty of the driver of every motor vehicle upon the highway to keep to the right hand side of the road or highway except upon one-way streets. When vehicles meet, each driver is required to take the right hand side of the road and stay there and give the other half of the road to the driver coming from the opposite direction so as not to interfere in passing, and in order that the passing may be accomplished safely for all concerned <sup>57</sup>

#### Washington

The mere fact, if it should be such, that L turned his automobile to the left side of the road in violation of the ordinance and statute, that fact alone would not be sufficient to make respondents liable in damages; whether in so doing, the driver was guilty of negligence proximately causing the injury would depend upon the circumstances and the reasons existing at the time <sup>58</sup>

### § 381. — Speed. <sup>59</sup>

#### Alabama.

I charge you, Gentlemen of the jury, that the statute setting

<sup>55</sup> Blackford v Kaplan, 135 OhSt 268, 20 NE2d 522

Former Ohio Gen Code § 6307-25  
18 now Ohio Rev Code § 4511 25

<sup>56</sup> Ordeman v Watkins, 114 Or 581, 236 P 483

<sup>57</sup> Womac v Casteel, 200 Tenn 588, 292 SW2d 782

<sup>58</sup> Burlie v Stephens, 113 Wash 182, 193 P 684

<sup>59</sup> See also §§ 344 and 379, *supra*

out the recommended speed for residential districts in Alabama does not make such speed an unlawful act under all circumstances, but whether or not such speed is lawful depends upon the conditions then existing so that the speed shall not be dangerous or unsafe.

If you are reasonably satisfied from the evidence that the speed at which the defendant's automobile was being operated on the occasion complained of was that speed at which a reasonably prudent person would have operated the automobile under the same or similar circumstances, then you cannot find that defendant was traveling at an unlawful speed on said occasion <sup>60</sup>

#### California

The law of this state does not prescribe an absolute speed limit, in terms of so many miles an hour, that was applicable at the time and place of the accident involved in this case. The law does ordain what it calls "prima facie speed limits"; and the law says that if the speed of a vehicle upon a highway is not in excess of the prima facie limit, such speed is lawful unless clearly proved to be in violation of what is known as the basic speed law; and if the speed of a vehicle upon a highway is in excess of the applicable prima facie limit, such speed is unlawful unless proved to be not in violation of the basic speed law.

However, our law further provides that proof of speed in excess of any prima facie limit shall not establish negligence as a matter of law, but that anyone who claims that a speed in excess of such a limit was negligent must, to support such a claim, prove as a fact that such speed was negligent in the circumstances involved.

The basic speed law to which I have referred provides as follows: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property" (Cal Vehicle Code, § 510)

The prima facie speed limit that was in effect at the time and place of the accident involved in this case was 55 miles an hour. <sup>61</sup>

<sup>60</sup> Tyler v Drennen, 255 Ala 377, 51 S2d 516

<sup>61</sup> Lewis v Doyle, 149 CalApp2d 176, 307 P2d 965



**Georgia**

If you find that the defendant, at the time of the alleged collision, was operating his automobile at a rate of speed in excess of 60 miles per hour, this would be negligence upon the part of the defendant <sup>62</sup>

**Illinois**

The court instructs the jury that in an action brought to recover damages, either to the person or property, caused by driving an automobile on the public highway at a greater rate of speed than — miles per hour, the plaintiff is deemed to have made out a prima facie case by showing the fact that he or she has been injured, and that the person running such automobile, either by himself or his agent, was at the time of the injury driving the same at a speed in excess of — miles per hour. <sup>63</sup>

**Indiana**

I instruct you that at the time of the accident in question, there was in full force and effect a statute in the state of Indiana, which, among other things, provided “47-2004 Speed Regulations—(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so restricted as may be necessary to avoid colliding with any person or vehicle or other conveyance on or near or entering the highway in compliance with legal requirements and with the duty of all persons to use due care

“(c) Prima facie speed limits Where no special hazards exist the following speed shall be lawful but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent, and that it is unlawful

“1 Twenty (20) miles per hour in any business district

“2 Thirty (30) miles per hour in any resident district”

I instruct you that if you find from a preponderance of the evidence that the defendant violated this statute, then the defendant was guilty of negligence per se, and if you further find from a preponderance of the evidence that such violation proximately caused plaintiff's injuries and damages as described in the complaint, and that the plaintiff was free from contribu-

<sup>62</sup> Hill v Kirk, 43 GaApp 549,  
159 SE 724

<sup>63</sup> Ward v Meredith, 220 Ill 66, 77  
NE 118

tory negligence himself, then your verdict would be for the plaintiff.<sup>64</sup>

Michigan.

In addition to restrictions as to the rate of speed, the statute requires that no motor vehicle shall be operated at a rate of speed greater than is reasonable and proper having regard to the safety of persons and property lawfully on the highway. If the conditions of the light are such, through darkness, mist or fog, that the driver is unable to see objects in the road the usual distance ahead of his car, he must check the speed of his car so he can stop within his range of vision. In accordance with this provision of the law, the courts hold that it is negligence for the driver of an automobile to propel it in a dark place in which he has to rely on the lights of his machine, at a rate of speed greater than will enable him to stop to avoid any obstruction within the radius of his lights or within the distance to which his lights would disclose the existence of an obstruction. If, for illustration, the lights on an automobile will only disclose objects in the highway ten yards away, it is the duty of the driver to so regulate the speed of his machine that he can at all times stop within that distance and avoid such obstruction. On nights which are misty or foggy, or the streets or pavements wet and slippery, it is necessary for the driver to take these conditions into consideration and, if necessary, further decrease the speed of his vehicle so that he can stop it within the radius disclosed by his lights.<sup>65</sup>

Minnesota.

Every violation of positive law constitutes negligence. Consequently, if this car was being driven at an unlawful rate of speed, if the signals prescribed by the statute were not given, or if the car was driven on the left side of the road instead of the right, such violation would constitute negligence.<sup>66</sup>

Ohio.

I should give you the law of the rules of the road insofar as they apply to the claims made here.

It is the law of Ohio that no person shall operate a motor vehicle in and upon the public roads and highways at a speed greater or less than is reasonable and proper, having due regard to the traffic, surface and width of the road or highway and of any other conditions then existing, \* \* \* it shall

<sup>64</sup> McClure v Miller, 229 Ind 422, 185 NW 860  
98 NE2d 498

<sup>66</sup> McMahon v Flynn, 154 Minn  
326, 191 NW 902

<sup>65</sup> Ott v Wilson, 216 Mich 499,

be *prima facie* lawful for an operator of a motor vehicle to drive the same at a speed not exceeding \* \* \* [the court then quoted that part of § 4511.21 of the Revised Code of Ohio relating to various rates of speed.]

Now, you notice the statute says "*prima facie*." By that we mean, at first blush. In other words, there is not, as most people think, a fixed and hard speed limit in Ohio. The speed that is lawful is the speed that is reasonable, and the speed that is unlawful is the speed that is unreasonable, and while the statute says that certain rates of speed under certain conditions at first blush, nothing else being taken into consideration, might be lawful or unlawful, yet upon determining whether the speed was reasonable or unreasonable, you must take into consideration all of the circumstances then existing at that time. The test is whether the speed, whatever it was, was a reasonable or unreasonable rate of speed.<sup>67</sup>

#### Virginia.

The court instructs the jury that the law of Virginia expressly prohibits any person from driving an automobile in such manner as not to have the same under complete control at all times, and declares that driving a car under such conditions will be deemed reckless driving.

And if the jury believe that at the time of the accident or immediately before, the defendant G. was driving his car in such manner as not to have his car under complete control, then he is guilty of negligence as a matter of law. And if the jury believe that this negligence was the proximate cause of the accident or contributed to the accident, they should find a verdict in favor of the plaintiff.<sup>68</sup>

#### Washington.

The violation of a speed ordinance or statute is not, in itself, sufficient to make the driver of the automobile liable in damages in the event of a collision. There must be something more; it must appear that such violation was the proximate cause of the injury.<sup>69</sup>

### § 382. — Reckless or dangerous driving.

I instruct you that at the time of the accident in question that there was in full force and effect a statute in the state of Indiana, which, among other things, provided:

<sup>67</sup> *Bennett v. Sinclair Refining Co.*,  
144 OhSt 139, 57 NE2d 776, affirm-  
ing judgment for plaintiff

504, 166 SE 704

<sup>69</sup> *Burke v. Stephens*, 113 Wash  
182, 193 P 684

<sup>68</sup> *Gaines v. Campbell*, 159 Va

**“Reckless driving** Any person who drives a vehicle with reckless disregard for the safety, property or rights of others shall be guilty of the offense of reckless driving, as defined in this section \* \* \* The offense of reckless driving, as defined in this section, may be based, depending upon circumstances, on the following enumerated acts and also on other acts which are not here enumerated but are not excluded and may be within the definition of the offense, (1) driving at such an unreasonably high rate of speed, ‘ ‘ ‘ (6) driving recklessly against another person or against the car or other property of another, or driving in any other specified manner in which the driver is heedless of probable injury to the safety, the property or the rights of others ” [§ 47-2001(c)]

I instruct you that if you find from a preponderance of the evidence that the defendant violated this statute, then the defendant was guilty of negligence per se; and if you further find from a preponderance of the evidence that such violation proximately caused plaintiff’s injuries and damages as described in the complaint and that the plaintiff was free from contributory negligence himself, then your verdict should be for the plaintiff <sup>70</sup>

### § 383. Effect of violation of ordinance generally.

#### Alabama

(1) If you are reasonably satisfied by the evidence that the child was injured as a proximate consequence of the violation of the city ordinance set out in the fourth count of the complaint, by the servant of defendant acting within the line and scope of his employment, then a prima facie case of actionable negligence is made out. <sup>71</sup>

(2) The court charges the jury that the violations, by plaintiff, of the city ordinances introduced in evidence would not prevent the plaintiff from recovering of the defendant for simple negligence on the part of defendant as charged in the first count of the complaint, unless the jury is reasonably satisfied from the evidence that such violation contributed proximately to the injury complained of and the burden of proof of such fact rested on defendant to so reasonably satisfy the jury. <sup>72</sup>

#### Arkansas

The jury are instructed that neither the traffic statutes of

<sup>70</sup> McClure v Miller, 229 Ind 422, 98 NE2d 498

also Titus v Braidfoot, 226 Ala 21, 145 S 423

<sup>71</sup> Hood & Wheeler Furn Co v Royal, 200 Ala 607, 76 S 965 See

<sup>72</sup> Godfrey v Vinson, 215 Ala 166, 110 S 13

this state nor the ordinances of the city of Ft. Smith which have been introduced in evidence create any civil liability against the defendants, and are only to be considered by the jury in passing upon the question as to whether there was negligence upon the part of either plaintiff or defendants.<sup>73</sup>

#### California

A violation of a provision of a statute or ordinance intended to regulate the conduct of people while in the use of the streets or highways is of itself negligence, and if such violation on the part of any person so using the streets or highways is the proximate cause of an injury to another, the former would thereby be liable to the one so injured for all of the damage proximately resulting to the latter thereby, provided that the latter was not himself guilty of negligence which proximately contributed to his own injury.<sup>74</sup>

#### Georgia

Now, gentlemen, the plaintiff further contends in this case that the defendant violated section 88-1002(a) of the ordinance of the city of Atlanta, as charged in her petition. The defendant denies this contention. I charge you that if you find that this collision occurred within the incorporated limits of the city of Atlanta, and if you find that there was in force and effect a valid City Ordinance as alleged in the plaintiff's petition and that the defendant violated said section of the City Code or Ordinance, then such violation would constitute negligence per se.<sup>75</sup>

#### Iowa

You are further instructed that a violation of said City Ordinance, without reasonable necessity therefor, constitutes negligence.<sup>76</sup>

#### Minnesota

They both had a right to make use of the streets, and this ordinance is passed for the protection of those who make use of the streets, and where the law is passed for the protection of certain individuals, and where there is a breach of that law or that ordinance, and it is the direct and proximate cause of the injury to another party, and that party is without contributory negligence, then it becomes negligence per se; that is, liability fixes as against the party who causes the injury.<sup>77</sup>

<sup>73</sup> Pollock v Hamm, 177 Ark 348, 6 SW2d 541

<sup>74</sup> Fouch v Werner, 99 CalApp 557, 279 P 183. See also Coursault v Schwebel, 118 CalApp 259, 5 P2d 77

<sup>75</sup> Hines v Pair, 90 GaApp 653, 83 SE2d 857

<sup>76</sup> Ege v. Born, 212 Ia 1138, 236 NW 75

<sup>77</sup> Loverage v. Carmichael, 164 Minn 76, 204 NW 921

**Nebraska**

The court instructs the jury that it is the duty of parties driving vehicles upon the streets to obey the ordinances of the city and the laws of the state with reference to such use of public thoroughfares. And, in this case, it was the duty of defendant to obey the ordinances of the city of Fremont with reference to the use of its streets for automobiles, and also the laws of the state and usual rules of the road. If you find the defendant failed in any or all the above particulars, such fact or facts should be considered by you with all other evidence as tending to prove negligence.<sup>78</sup>

**New York**

Violation of the traffic regulations of the police department of the city of New York is not negligence per se, but may be considered only as some evidence of negligence in connection with the other facts and circumstances of the accident.<sup>79</sup>

**Ohio**

This ordinance is a law of the city of Toledo and a violation thereof is negligence as a matter of law, just as a violation of a statute of the state is in itself negligence.<sup>80</sup>

**Oklahoma**

You are instructed that certain sections of the city ordinances of the city of Tulsa have been introduced in evidence in this case, and that a violation of a city ordinance constitutes negligence per se, that is, negligence within itself.

If you find and believe from a preponderance of the evidence in this case that the defendant violated any of the sections of the ordinances above referred to, and that such negligence on the part of the defendant, if any, was the direct and proximate cause of the injury complained of, and that the plaintiff was free from contributory negligence, then your verdict should be for the plaintiff and against the defendant

On the other hand, if you fail to so find, your verdict should be for the defendant.<sup>81</sup>

**South Carolina**

A violation of a state statute or a city ordinance would be negligence as a matter of law.<sup>82</sup>

<sup>78</sup> Mullally v Haslam, 106 Neb 860, 184 NW 910

<sup>79</sup> Roles v John A Schwarz, Inc (AppDiv), 278 NYS 307

<sup>80</sup> Adams v Harvitt, 30 OhApp 211, 164 NE 773 See also Swoboda

v Brown, 129 OhSt 512, 196 NE 274

<sup>81</sup> Wasson v Davis (Okl), 283 P2d 807

<sup>82</sup> Johnston v Bagger, 151 SC 537, 149 SE 241

**Utah**

Actionable negligence may not be predicated on a failure to have lights, or to sound the horn, or to drive a car in violation of an ordinance or statute, unless such unlawful or negligent acts, or some of them, constitute the proximate cause of the injury.<sup>83</sup>

**Washington**

(1) The burden of proving a violation of an ordinance of the city is upon the plaintiff, and even if the driver of the automobile did violate the ordinance, such violation would not constitute negligence, upon which recovery could be had, unless the act which constituted the violation of the ordinance was the proximate cause of the injury<sup>84</sup>

(2) If you find from the preponderance of the evidence that plaintiff operated his automobile at the time and place of the collision, in violation of the ordinances of Spokane or of the laws of the state as you have been instructed, such operation would be of itself negligence<sup>85</sup>

(3) If you should find from the evidence that the plaintiff, immediately before he started to cross the street, failed to look north to observe whether there were approaching vehicles, and if you should find that such failure to look north amounted to negligence, that is, it was the failure to exercise ordinary care on his part, yet, if you further find that he had reached a place on the street where, if the defendant had operated its motor-truck in accordance with the provisions of the city ordinance, he would have been out of the danger zone, then his failure to look north at the time when he started to cross the street would not preclude a recovery, because of his right to rely upon the use of the street by the defendant in a lawful manner, and of his right to expect the automobile truck to be at a place where under the ordinance it had a right to be.<sup>86</sup>

**§ 384. — Brakes.**

You are instructed that section — of ordinance No. — of the city of — provides. "Vehicles or combinations of vehicles having two, three or four axles, shall be equipped with two independently operated brakes controlling the wheels of one axle, either of which shall be capable of controlling the vehicle or combination of vehicles at all times."

<sup>83</sup> Wilcox v Wunderlich, 73 Utah 1, 272 P 207

<sup>84</sup> Burhe v Stephens, 113 Wash 182, 193 P 684

<sup>85</sup> Child v Hill, 155 Wash 133, 283 P 1076

<sup>86</sup> Mosso v E H Stanton Co, 85 Wash 499, 148 P 594

A violation of said provision of said ordinance is a violation of a rule of positive law and is negligence in itself. So, if you find by a fair preponderance of the evidence that the bus of the N C T Co., at the time of the accident in question, was not equipped as required in said ordinance, and that such failure was the proximate cause of the accident, and of the injuries, if any, complained of by the plaintiff, that then your verdict should be for the plaintiff and against said defendants.<sup>87</sup>

### § 385. — Arm signals.

It was the duty of the driver of the truck at the time and place referred to, to exercise the highest practical degree of care to obey the ordinances introduced in evidence and relating to turning to the left, requiring him to keep his truck as near as practical to the center of the street along which he was approaching Forty-fourth Street if he desired to turn to the left on the intersection, and relating to giving reasonable warning of his intention to turn by holding his left hand out of the side of the car and below a horizontal position, so that the same could be seen from the rear of his truck.

If you find from the evidence that the driver of the car did not comply with the foregoing provisions of said ordinances, then you are instructed that he was guilty of negligence, and if you find from the evidence that such negligence, if any, directly caused the collision of the truck and the motor-cycle, and if the plaintiff was in the exercise of ordinary care, the jury must find for plaintiff.<sup>88</sup>

### § 386. — Speed.

#### Alabama

Before plaintiff will be entitled to recover on account of any violation of the ordinance, with reference to turning from one street into another, such violation of the ordinance must have been the direct cause of the accident, and if, when the driver made his turn, the motor-cycles were not then in view, but thereafter ran into the automobile at a high rate of speed, defendant would not be liable for the violation of such ordinance, even if there was a violation.<sup>89</sup>

#### Missouri

The court instructs the jury as regards the ordinance law of ——— City in evidence, if you believe from the evidence that as the east-bound truck approached the intersection the

<sup>87</sup> Jacklin v North Coast Transp Co., 165 Wash 236, 5 P2d 325

7 SW2d 452

<sup>88</sup> Bates v Friedman (MoApp),

<sup>89</sup> Karpeles v City Ice Delivery Co., 198 Ala 449, 73 S 642



car had already entered said intersection and was in danger of colliding with said truck, then it was unlawful for said truck to be driven into or over said intersection at a speed in excess of — miles per hour, and if you further believe from the evidence that the operator of said truck did so and thereby violated said ordinance law, then he was negligent in law, and if you further believe from the evidence that by such negligence, if any, the operator of the truck caused or contributed to and helped to cause said collision, and that as a result thereof, R. was injured and that he died as a result of such injury, and that R. at all times used ordinary care, and was at said time riding in the car with the permission of the owner and driver thereof, and at the time of said collision and death, plaintiff was his wife and is now his widow, then your verdict must be for plaintiff under this instruction <sup>90</sup>

#### Oklahoma

The driving of an automobile along the streets of the town of Fairfax in excess of the lawful rate of speed as fixed by the ordinance would be negligence per se, and if the jury finds that the defendant's car was being so driven, and as a result thereof, plaintiff received the injuries complained of, your verdict should be for plaintiff. <sup>91</sup>

#### South Carolina

Where one violates the traffic ordinances of the city by driving at a greater rate of speed than the maximum allowed by the ordinance, he is guilty of negligence per se, whether he is a man or woman, whenever that is established, then negligence is made out against that person. <sup>92</sup>

#### Washington

(1) The violation of a speed ordinance or statute is not, in itself, sufficient to make the driver of the automobile liable in damages in the event of a collision. There must be something more; it must appear that such violation was the proximate cause of the injury. <sup>93</sup>

### § 387. — Driving on wrong side of street.

#### Missouri

It was the duty of the driver of the truck at the time and place referred to, to exercise the highest practical degree of

<sup>90</sup> Robinson v. Ross (MoApp), 47 SW2d 122. See also Evans v. Klusmeyer, 301 Mo 352, 256 SW 1036.

<sup>91</sup> Haskell v. Kennedy, 151 Okl 12, 1 P2d 729.

<sup>92</sup> De Lorme v. Stauss, 127 SC 459, 121 SE 370.

<sup>93</sup> Burlie v. Stephens, 113 Wash 182, 193 P 684. See also Gonnon v. Lee, 119 Wash 471, 206 P 2.

care to obey the ordinances introduced in evidence and relating to turning to the left, requiring him to keep his truck as near as practical to the center of the street along which he was approaching Forty-fourth Street if he desired to turn to the left on the intersection, and relating to giving reasonable warning of his intention to turn by holding his left hand out of the side of the car and below a horizontal position, so that the same could be seen from the rear of his truck

If you find from the evidence that the driver of the car did not comply with the foregoing provisions of said ordinances, then you are instructed that he was guilty of negligence, and if you find from the evidence that such negligence, if any, directly caused the collision of the truck and the motor-cycle, and if the plaintiff was in the exercise of ordinary care, the jury must find for plaintiff.<sup>94</sup>

#### New York

A traffic regulation of the police department of — City, in force at the time of the accident, provides as follows “11-a. A moving vehicle shall keep as near as practicable to the right-hand curb so that faster moving traffic may pass on the left.”

The violation of this traffic regulation by either of the drivers would be evidence of negligence which could be taken into consideration with all the other evidence as bearing on the issue of negligence, provided you also find that there was a causal connection between the violation of the regulation and C's injury<sup>95</sup>

#### Washington

(1) But if the defendant, at the time of the injury, was violating an ordinance of the city by being upon the left-hand side of the street, and was guilty of negligence, yet if the plaintiff, at the time of the injury, was also violating an ordinance of the city of Seattle by being unlawfully upon the part of the street where the automobile had the prior right, and was guilty of negligence, and the negligence of both plaintiff and defendant was a proximate cause of the injury to plaintiff, then the plaintiff can not recover<sup>96</sup>

(2) The mere fact, if it should be such, that L turned his automobile to the left side of the road in violation of the ordinance and statute, that fact alone would not be sufficient to make respondents liable in damages, and whether in so

<sup>94</sup> Bates v Friedman (MoApp),  
7 SW2d 452

<sup>96</sup> Mickelson v Fischer, 81 Wash  
423, 142 P 1160 See also Bullis

<sup>95</sup> Callahan v Terminal Cab Corp, 259 NY 112, 181 NE 67

doing the driver was guilty of negligence proximately causing the injury would depend upon the circumstances and the reasons existing at the time <sup>97</sup>

Circumstances may arise where it is entirely proper, in the exercise of reasonable care, to violate an ordinance by turning an automobile to the wrong side of the street. The mere fact that the automobile may be on the wrong side of the street at the time of the collision is not conclusive of negligence, because the driver of the automobile has the right to show why he did so and to excuse that action, if the jury believe that, in the exercise of ordinary care, under the circumstances, he was justified in turning to the wrong side of the street, there would be no negligence in such act upon which recovery can be had <sup>98</sup>

**§ 388. — Duty to stop before crossing or turning into certain streets.**

**Alabama**

I charge you, gentlemen of the jury, that at the time of the collision complained of in this cause, Bessemer Boulevard had been designated by an ordinance of the city of Birmingham as a boulevard or through highway <sup>99</sup>

**New York**

A failure to stop, if it was a violation of a city ordinance, is evidence of negligence but is not negligence as a matter of law. <sup>1</sup>

**§ 388A. — Right of way at intersections. <sup>2</sup>**

**Georgia**

The plaintiff contends as another act of negligence on the part of the driver of the truck that there was in force and effect a city ordinance of Atlanta providing as follows

“The operator of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has just entered the intersection ”

The defendants admit the existence of the ordinance, but they deny in their answer and say here that the ordinance was violated by the driver of the truck, and, on the contrary, say that the ordinance was complied with I charge you that if you find that this ordinance was violated, that would constitute

<sup>97</sup> *Burlie v Stephens*, 113 Wash 182, 193 P 684

<sup>98</sup> See footnote 97, *supra*

<sup>99</sup> *Titus v Braidfoot*, 226 Ala 21, 145 S 423

<sup>1</sup> *Manard v Sheppard*, 243 App Div 265, 276 NYS 494

<sup>2</sup> See also § 350, *supra*, and

§ 457, *infra*

negligence as a matter of law. If you find that such violation [if any] was the proximate cause, or one of the proximate causes, of the injuries sustained by plaintiff, if he sustained injuries, then, the plaintiff would be entitled to a verdict for damages unless barred of recovery by some other rule given you in this charge. If you find that there was no violation of that city ordinance, then what I have had to say on that subject would have no application.<sup>3</sup>

Ohio

(1) If you find from the evidence that the automobile driven by C arrived first at the intersection, or if the two automobiles arrived at the intersection at the same time, or nearly so, then the defendant's automobile would have the right of way to cross the street, and it would be the duty of plaintiff to give way to such right and allow defendant's automobile to pass across the street ahead of the automobile of plaintiff, and if plaintiff failed to do this, he would be guilty of violating the ordinance, and if his violation of the ordinance caused or contributed to cause, proximately, his own injury, he could not recover.<sup>4</sup>

(2) Section 57 of the traffic ordinances of the city of S. provides

"Whenever traffic at an intersection is controlled by traffic control signals exhibiting colored lights or the word 'go' or 'caution' or 'stop,' said lights and turns shall indicate as follows

" 'Red or stop.' Traffic facing signal shall stop before entering the nearest crosswalk at the intersection, or at such other point as may be designated by the director and remain standing until green or go is shown alone.

" 'Red or caution.' When shown alone or together with the green or go, traffic facing the signal shall stop before entering the nearest crosswalk, or designated line at the intersection."

The portions of section 57 of this particular ordinance which the court has read to the jury, mean just what they say. Applied to this case, they mean simply this, that if, as defendant proceeded in a northerly direction in and along D street and approaching M street, either red or caution shown alone or to-

<sup>3</sup> Pilot Freight Carriers, Inc v Parks, 80 GaApp 137, 55 SE2d 746

The action was against a common carrier for hire by motor truck, its

driver and its insurer. Judgment on verdict for plaintiff was affirmed.

<sup>4</sup> Baltimore & O R Co v Miller, 23 OhApp 255, 156 NE 222

gether with the "green" or "go" signal, then it was the duty of defendant, as he approached said intersection, to stop before entering the nearest crosswalk—that would be the crosswalk on the south side of M street.

And further, that as he approached in a northerly direction along D street, toward M street, the color "red" or the word "stop" was exhibited by the traffic light, then it was the duty of the defendant to stop his automobile before entering the crosswalk on the south side of M street, and not to proceed northerly until the green light was shown by such traffic signal.

Those portions of section 57 are expressive of a specific, mandatory and positive requirement, and it therefore follows that if, from a preponderance of the evidence in this case, you find the defendant violated the requirements of this ordinance, such proven violation would constitute negligence in and of itself, and you would be warranted in concluding that the defendant was guilty of negligence in such respect claimed by the plaintiff.

On the other hand, it of course follows that if, from all the evidence in the case, the defendant did not violate this portion of section 57, you would be compelled to conclude that defendant was not guilty of negligence as to this claim made by the plaintiff.<sup>5</sup>

#### § 389. —Making "U" turns.

At the time of the alleged injury, there was a certain ordinance in force in the city of —, Indiana, regulating the use of Broadway, in said city, and which is set forth in plaintiff's complaint and has been introduced in evidence. This ordinance is as follows: "It shall be unlawful to make a 'U' turn on Broadway." This ordinance applies to the drivers of taxicabs and it is the duty of such drivers not to make a "U" turn on Broadway, in said city, and a failure to obey said ordinance is negligence, and if such negligence proximately causes an injury to another person, if he be without negligence contributing thereto, such person may recover therefor.<sup>6</sup>

#### § 390. — Passing street car.

You are instructed that, by ordinance of the city of St. Louis, Missouri, in force and effect at the time of the acci-

<sup>5</sup> *Casanova v Wagner*, 85 OhApp 278, 40 OhO 192, 88 NE2d 312.

In this case, a judgement on verdict for plaintiff was reversed for refusal of the trial court to charge on an additional point requested,

after the general charge by the defendant, but no error in the charge as given was found.

<sup>6</sup> *Setzer v Alger*, Superior Court, Lake County, Indiana, No 1254.

dent in question, it was unlawful for the operator or driver of a truck in overtaking a street car to pass said street car on the left-hand side thereof, except on a one-way street. And, if you find and believe from the evidence that the person in charge of and driving the vehicle which struck the plaintiff, if you find and believe from the evidence she was so struck, was at such time in the employ of the defendant, and you further find from the evidence that at such time such truck was being used in the scope of his said employment, and you further find from the evidence that Broadway, at the point where such collision took place, if you so find, was a two-way street, and you further find from the evidence that said truck, while running north on Broadway in a northerly direction, overtook a street car which was then and there standing on the east side of Broadway for the purpose of permitting passengers to alight from said street car, and you further find and believe from the evidence that the place where said street car was so stopped was a usual and regular stopping place for said street cars to stop for the purpose of permitting passengers to board and alight from said cars, and that said point on Broadway was a place customarily used by persons for crossing thereof, and you further find and believe from the evidence that the driver of said truck, upon overtaking said street car, did drive said truck on the left-hand side of said street car, and you further find and believe from the evidence that said truck collided with the plaintiff while so passing said street car on the left side of said car, and injured her, then the driving of said truck on the left-hand side of said street car was negligence; and, if you further find from the evidence that such negligence directly contributed to cause plaintiff's injuries, if you find she was injured, and if you further find that she was exercising ordinary care for her own safety, your verdict must be for the plaintiff. <sup>7</sup>

### § 391. Common-law negligence and relation to statutes.

#### Kentucky

Precautions prescribed by statute do not relieve one from his common-law duty to observe ordinary care to avoid injury to others. <sup>8</sup>

#### Ohio

What the acts done or omitted were under the circumstances are the matters of fact, the determination of which

<sup>7</sup> Gardner v. Burkait Mfg. Co. (MoApp), 7 SW2d 706

<sup>8</sup> Prichard v. Collins, 228 Ky 635, 15 SW2d 497

devolves upon you as a jury. The legal duty or obligation due to Mr C from the defendant company, as they sought to use that highway at that time are matters of law upon which it is the duty of the court, in our way of conducting a trial, to inform the jury. These legal duties may arise from two different sources. One is the state legislation, the legislative authority by which certain specific rules are laid down for the conduct of persons as they use public places such as was this highway. But it is impossible by legislation to provide a rule for every possible situation in which persons find themselves, and yet it is necessary that there be a standard by which to measure the conduct of others, and, because of this, the courts have, out of the experience of the ages, evolved a measure which, in this particular case, we call the "common-law rule," and by that is meant what we sometimes call ordinary care.

Now looking to the next group of charges of negligence in this paragraph marked "second" in the petition, the test is that which I suggested to you as the "common-law rule," ordinary care. By that we mean. What would a person of ordinary care and prudence have done under the same or similar circumstances? That is the measure by which you will judge these things.<sup>9</sup>

#### South Carolina

I have defined common-law negligence and common-law recklessness. When I say common law, I mean that law which has crystallized through usage of hundreds of years in this country irrespective of any statute. The common law which we inherited from the old country is based on custom. It is the law and it is obligatory on us to observe it. On the other hand, we speak of statutory law and by that I mean the law which is promulgated after having run through the mill of the legislature and has been crystallized into a statement of the rules for our government and guidance, the acts of the legislature, the laws made by the general assembly. Where the general assembly has passed and promulgated a statute and that statute is of force and seeks to govern us in our conduct on the public highway and that law is violated, we are guilty of negligence by reason of the violation of that law, negligence as a matter of law—you have heard it expressed "negligence per se," which means negligence in itself. If we recklessly violate the law of the land which seeks to govern us in our conduct, if we consciously violate it, we are guilty of not only negligence but we are guilty of that character of conduct which is indicated

<sup>9</sup> Chambers v West Penn For-      Huron County, Ohio, No 15524  
warding Co., Common Pleas Court,

as recklessness as a matter of law That is what the plaintiff charges, negligence and recklessness under the common law and negligence and recklessness by reason of the charge in this complaint of violation of the statutory law. <sup>10</sup>

**§ 392.—Customs and usages.**

**Connecticut**

Court In my instructions to you, I have told you that the statute referred to the traveled portion of the road, and that was that part of the highway customarily traveled by vehicles upon the highway Does that answer your question?

Foreman Under the law?

Court Well, that would be the law It would be a question for you to decide which portion is customarily traveled by persons upon the highway, and, in the case of a state highway, it is that portion of the road which is customarily traveled, or that portion which is prepared for the ordinary travel upon the highway. I think that should be distinguished from the shoulders of the road <sup>11</sup>

**Missouri**

Although defendant's truck was making no unusual noise for a truck of that kind and although it may have been customary for trucks in the vicinity of Poplar Bluff to be equipped with tarpaulins rolled and fastened over the top of the cab as in this case, nevertheless, if the driver of the truck saw, or by the exercise of due care could have seen, that the horse which plaintiff was riding was showing signs of fright and uneasiness at his approach, and he failed to give heed thereto, but continued to drive on without attempting to use the means available in an effort to remove the cause of fright, defendant would be liable, if such failure resulted in injury to plaintiff <sup>12</sup>

**North Dakota**

I charge you further that it is the duty of the driver of an automobile upon the public highways to use reasonable care and diligence in the driving of the same. The driver or operator of such automobile upon the public roads of this state shall be governed by the usual law of the road, by turning to the left when passing vehicles headed in the same direction and by turning to the right when meeting vehicles headed in an opposite direction <sup>13</sup>

<sup>10</sup> Parker v Simmons, 163 SC 42, 161 SE 169

<sup>11</sup> DeLucia v Kneeland, 108 Conn 191, 142 A 742

<sup>12</sup> Holloway v Barnes Groc Co, 223 MoApp 1026, 15 SW2d 917

<sup>13</sup> Morstad v Kopald Elec Co, 60 ND 325, 234 NW 56



## Oklahoma

When a master, either by custom or by consent, undertakes the duty of furnishing an employee with transportation between the employee's place of work and his home, it is the duty of the master to use ordinary care to furnish said employee with reasonably safe transportation and to use ordinary care to protect him from injury during said transportation, and a failure to use such ordinary care on the part of the defendant would be negligence and would render the defendant liable to the plaintiff if such negligence directly and proximately caused or contributed to the death of decedent, unless the decedent was guilty of contributory negligence. <sup>14</sup>

## Utah

The court instructs the jury that the right of precedence at a crossing, whether given by law, or established by custom, has no proper application except where the travelers or vehicles on intersecting streets approach the crossing so nearly at the same time at such rates of speed that, if both proceeded, each without regard to the other, a collision or interference between them is reasonably to be apprehended. In such a case, it is the right of the one having the precedence to continue his course, and it is the duty of the other to yield him that right of way. <sup>15</sup>

## Washington

I instruct you that there is, arising from usage and custom, what is known as the law of the road, which requires the drivers of automobiles traveling upon a continuously used street or highway to keep upon the right-hand side of such street or highway in the direction in which they are traveling. While this rule is not inflexible, and one may use what is to him the left-hand side of the road, he can not do so if his conduct in so doing will be a source of danger to others; and if he does use the left-hand side of the road he must always exercise a degree of care commensurate with his position. <sup>16</sup>

**§ 393. —Guest statutes; wilful, wanton, or reckless conduct; gross negligence.<sup>16a</sup>**

## Federal

## District of Columbia

The burden is upon the plaintiffs to prove by a preponderance of the evidence that the defendant drove recklessly and at

<sup>14</sup> Cushing Ref. & Gasoline Co. v. Deshan, 149 Okl. 225, 300 P. 312.

<sup>15</sup> Collins v. Liddle, 67 Utah 242, 247 P. 476.

<sup>16</sup> Johnson v. Bloedel, 102 Wash. 293, 172 P. 1171.

<sup>16a</sup> See also § 481, *infra*.

a rate of speed which was greater than reasonable and proper, having regard to the width, traffic, and use of the highway, immediately preceding the happening of the accident. Further, the burden is on the plaintiffs to prove that any such act was the proximate cause of the accident, and should you find as a matter of fact that the defendant did not drive recklessly and at such a rate of speed or that such driving, even though it was reckless and at an excessive rate of speed, was not the proximate cause of the accident, then your verdict should be for the defendant in both cases.<sup>17</sup>

#### Alabama.

Now what is wantonness and wilfulness? If a person intentionally inflicts an injury upon another, he acts wilfully "Wilfully" means intentionally. A man may be guilty of what the law terms wantonness without being wilfully negligent. If a man drives a motor vehicle in such a reckless or careless manner that he is conscious that his conduct in so driving will probably injure another person, or the property of another person, that would be what we call wantonness. While it has elements of negligence, it goes further than negligence. Where you do an act intentionally or you do it under such circumstances that you are conscious that, acting this way, under these circumstances, in this particular situation, you probably will injure another, and you heedlessly go on and act that way, then you would be guilty of wanton conduct.<sup>18</sup>

#### Arizona

Negligence ordinarily is the result of carelessness; wilfulness implies an intent or purpose to do a thing, while wantonness implies an indifference as to the result of an act. Whether an act is one or the other of these depends upon the circumstances under which it is done.<sup>19</sup>

#### California

(1) The term "gross negligence" has been defined as "the want of slight diligence," as "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and as "that want of care which would raise a presumption of conscious indifference to consequences."<sup>20</sup>

(2) I instruct you that the burden of proof always rests upon the plaintiff to show the alleged gross negligence of the

<sup>17</sup> Paxson v Davis, 65 F2d 492

295 P 975

<sup>18</sup> Caruth v Sparkman, 226 Ala 594, 147 S 884

<sup>20</sup> Simpson v Steinhoff, 131 Cal App 660, 21 P2d 960

<sup>19</sup> Lutfy v Lockhart, 37 Ariz 488,

defendants and to show such gross negligence by a preponderance of the evidence. Such burden never shifts to the defendants to show that they were not negligent.<sup>21</sup>

(3) Wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. The law has excluded in a case where a guest is suing all forms of negligence as a basis of recovery. The law will only permit a recovery where a guest sues when it appears that the thing done by the defendant amounts to misconduct as distinguished from negligence, and the law further states that this misconduct must be wilful. While the word "wilful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. Wilful misconduct implies the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from possible) result or the intentional doing of an act with a wanton and reckless disregard of its possible result.

The mere failure to perform a statutory duty is not alone wilful misconduct. It amounts only to simple negligence. To constitute wilful misconduct, there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended coupled with a conscious failure to act to the end of averting injury plus knowledge that an injury to a guest will be a probable as distinguished from a possible result.<sup>22</sup>

(4) Wilful misconduct would be an act done by the host with intent to cause the disaster involved in the suit with consequential damages to the guest, or the failure by the host to prevent the disaster, intending by such omission to permit the occurrence, with such injuries as would probably result therefrom to the guest.<sup>23</sup>

(5) You are instructed that it is a part of the duty of the operator of a motor vehicle to keep his machine always under control, so as to avoid collisions with other cars and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. Accordingly, the fact that he did not know that any one was on the highway, is no excuse for conduct which would

<sup>21</sup> *Walters v DuFour*, 132 Cal 2d 129, 299 P2d 668  
App 72, 22 P2d 259, 23 P2d 1020

<sup>23</sup> *Walker v. Bacon*, 132 CalApp 625, 23 P2d 520

<sup>22</sup> *Ching v Dy Foon*, 143 CalApp

have amounted to recklessness if he had known that another vehicle or person was on the highway <sup>24</sup>

(6) It is not the absolute speed at which a car is being driven that determines whether or not it is being operated at a reckless rate, but the condition and circumstances of the highway at the time must be taken into consideration. <sup>25</sup>

**Connecticut.**

(1) "Heedlessness or \* \* \* reckless disregard of the rights of others," as used in the statute, means an indifference in regard to the results of an act—a reckless disregard of the just rights and safety of others, and of the consequences that may ensue—an indifference as to whether wrong is done or not, that is, conduct so wanton as to involve a reckless disregard of the rights of others <sup>26</sup>

(2) Conduct arising from momentary thoughtlessness, inadvertence or an error of judgment, does not indicate a reckless disregard of the rights of others. Conduct indicating a reckless disregard of the rights of others is quite distinct in its character from merely negligent conduct. It is conduct which indicates an indifference to the consequences of action and constitutes wanton misconduct. <sup>27</sup>

(3) Now, this matter of recklessness is not necessarily a matter of speed, it has to do with the manner in which one operates a motor vehicle on the public highway in view of the conditions which obtain \* \* \*. In maneuvering one's car in the highway what one does must be judged in the light of all of the circumstances. Here the condition of traffic, the width of the road, the presence of an intersecting street, in so far as that exerted any influence upon the conduct of the parties, and, if you find that the defendant here did stop his car unexpectedly and quickly and that his doing so was negligent, and that he failed to give a proper signal or gave an inadequate signal, that sort of conduct in itself would be reckless misconduct within the meaning of this statute, so also would the failure to keep a proper lookout be reckless misconduct if it should amount to negligence. Any other conduct in which you may find the defendant was concerned may also be examined in the light of all the circumstances and surround-

<sup>24</sup> Johnson v Johnson, 137 Cal App 701, 31 P2d 237

<sup>25</sup> Smith v Pacific Greyhound Corp., 139 CalApp 696, 35 P2d 169

<sup>26</sup> Lucas v Hickcox, 117 Conn

513, 169 A 191. See also Pietrycka v Smolan, 98 Conn 490, 120 A 310, affd in 102 Conn 42, 127 A 717

<sup>27</sup> Lucas v Hickcox, 117 Conn 513, 169 A 191

ing conditions. If you find that it was negligent, as I have explained negligence to you, then there was a violation of this statute and that is negligence.<sup>28</sup>

**Idaho.**

You are further instructed that it is unlawful for any person to drive any vehicle upon a highway in this state carelessly and heedlessly, in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property.<sup>29</sup>

**Illinois.**

If you believe from a preponderance of all the evidence under the instructions of the court that the plaintiff has proved that the defendant was guilty of wilful and wanton conduct as alleged in the complaint, and that such wilful and wanton conduct, if any, caused or proximately contributed to cause the accident, injury and death complained of in this case, and if you further find from a preponderance of all the evidence under the instructions of the court that the plaintiff's intestate, A G, and the next of kin of the said A G, deceased, at and immediately prior to the accident referred to herein were free from wilful and wanton conduct which caused or proximately contributed to cause his injury and death, then you should find the issues in favor of the plaintiff.<sup>30</sup>

**Indiana**

By Indiana statute it is unlawful for any person to drive or operate an automobile on any public highway in this state in a reckless or dangerous manner and so as to endanger the life, limb or property of any person, and for the purpose of that law the statute defines the term "reckless driving" as meaning, among other things, driving on that side of the highway which is to the left of the operator, or driving in any other manner that is not safe and prudent. And if you find from the evidence that, at the time and place in question, defendant was driving her car on her left side of the highway, or in any manner that, under the existing circumstances, was not safe and prudent, as alleged in the complaint, then and in that event defendant was guilty of negligence. And if you find that such negligence, if any, was the proximate cause of defendant's injuries, if any you find, to which no negligence of his own contributed, your verdict should be for the plaintiff.<sup>31</sup>

<sup>28</sup> *Amato v Desenti*, 117 Conn 612 169 A 611

<sup>29</sup> *State v Gee*, 48 Idaho 688, 284 P 845

<sup>30</sup> *Trust Co v Ancateau*, 317 Ill App 186, 46 NE2d 125

<sup>31</sup> *Fahey v Street*, Circuit Court, Marion County, Indiana, No 45383

**Iowa.**

By "reckless" as used in the statute and in these instructions, is meant more than negligence. It means proceeding without heed of or concern for consequences. It implies no care, coupled with disregard for consequences.<sup>32</sup>

**Massachusetts**

You analyze the facts, as to whether the conduct, having regard to all the facts and circumstances, was a little worse than negligent, as to whether it found its place somewhere between these two limits that I have mentioned, negligence and wilful, wanton and reckless conduct. Now, if you say that he was negligent, and you say he was more than negligent, and that you would call his conduct something somewhere between negligence and wilful, wanton and reckless conduct, you do not need to say just where it is, but if it is somewhere between those two points, then it is gross negligence.<sup>33</sup>

**Nebraska**

Gross negligence means great or excessive negligence, that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty.<sup>34</sup>

See also *Cleveland, C, C & St L R Co v Starks*, 174 Ind 345, 92 NE 54, where an instruction on wilful injury, in an action against a railroad company, was held erroneous. After stating that the instruction was incorrect, the reviewing court said "It is proper in this connection to say that negligence can not be of such a degree as to become wilfulness, and no purpose or design can be said to exist where the injurious act is merely negligent." The effect of the instruction under consideration was to direct the jury that the charge of wilfulness was established, if the act which produced decedent's death was intentional. The act on appellant's part which caused such death was the running of its train over the crossing. This was assuredly an intentional but not an unlawful act. It was not enough, therefore, to charge that wilfulness consisted merely in showing that the act producing the death in question was intentional. It must be made to ap-

pear that the act or omission which caused the death was wilful or intentional, and of such a character as that such death must reasonably have been anticipated as the natural and probable consequence of the act, that is, decedent was in a position of imminent peril and unconscious thereof, or unable to extricate himself therefrom, and that the engineer in charge of the train had knowledge of such facts, and power and opportunity to stop the train or avoid the collision, but intentionally omitted to do so, and with such knowledge, power, and opportunity wilfully ran such train over the crossing in utter disregard of consequences."

<sup>32</sup> *Siesseger v Puth*, 216 Ia 916, 248 NW 352.

<sup>33</sup> *Learned v Hawthorne*, 269 Mass 554, 169 NE 557.

<sup>34</sup> *Landrum v Roddy*, 143 Neb 934, 12 NW2d 82, 149 ALR 1041, approving definition in *Morris v Erskine*, 124 Neb 754, 248 NW 96.

### North Carolina

An act is wanton when, being needless, it manifests no right-ful purpose, but a reckless indifference to the interests of others, and it may be culpable without being criminal <sup>35</sup>

### Ohio

The court charges you that "wantonness can never be predicated upon speed alone, but where the concomitant facts show an unusually dangerous situation and a consciousness on the part of the driver that his conduct will in common probability result in injury to another of whose dangerous position he is aware, and he drives on without any care whatever, and without slackening his speed, in utter heedlessness of the other person's jeopardy, speed, plus such unusual dangerous surroundings and knowing disregard of another's safety may amount to wantonness" The court tells you that is the law <sup>36</sup>

### Oregon.

(1) A brief definition of gross negligence is "great negligence" The term "gross" you know, means great or extreme Gross negligence must include an element of carelessness so great that the jury can say that there was not only an absence of the due care that should have been exercised, but also a degree of negligence materially greater than that which would constitute ordinary negligence What would be gross negligence under one set of circumstances might not be so under another, and the highly dangerous consequences to be apprehended in one case might contribute to render that gross negligence which would not be such in another case Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence

(2) Gross negligence means an absence of any care on the part of a person and it is the duty of plaintiff to prove to you by a preponderance of the evidence that the personal rights of plaintiff were recklessly disregarded by the failure of defendant to act so as to avoid such injuries, evincing an utter disregard of the consequences by which such injuries were caused

<sup>35</sup> Wise v Hollowell, 205 NC 286, 171 SE 82

<sup>36</sup> Kennard v Palmer, 143 OhSt 1, 53 NE2d 908

The above charge is inserted merely as a guide in the new subject matter, since in passing upon it, the court held "It is not prejudicial

error to give a special instruction before argument at the request of the plaintiff, which, although in the abstract contains a correct proposition of law, pertinent to the case, where the defendant interposes no objection to the form or substance of such instruction "

(3) Gross negligence contemplates a disregard of the safety of others greater than in the case of ordinary negligence, or failure to use reasonable care under the circumstances. Gross negligence does not require that the injury is intentional but I believe it does require that the negligence be intentional if the person knowingly and wilfully fails to perform a duty owing to other persons and thereby causes injury. The term "gross negligence" can not be defined exactly but it means generally the same as an utter reckless or deliberate disregard of the safety of others <sup>37</sup>

(4) Gross negligence is the want or absence of or failure to exercise even slight care or diligence; it is the want of that care and diligence which even careless, thoughtless or inattentive persons are accustomed to exercise; it is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger; it is a degree of negligence materially greater than ordinary negligence, it must be understood as meaning a greater want of care than is implied by the term "ordinary negligence." The circumstances of each particular case must be taken into consideration, and in every case, it is for the jury to pass upon the particular conditions and circumstances

Gross negligence is materially more want of care than constitutes simple inadvertence, it is an act or omission respecting legal duty of an aggravated character, as distinguished from a mere failure to exercise ordinary care; it is a heedless and palpable violation of legal duty respecting the rights of others <sup>38</sup>

#### South Carolina

So much for the definition of negligence. This plaintiff is seeking to recover actual damages he claims to have suffered in his person directly and proximately from an alleged wrong and he is also asking you to award him punitive damages predicated upon that alleged wrong. He says that the wrong was both negligent conduct and reckless conduct.

What is the difference between negligence and recklessness? I have defined negligence to you, and I will try to define that term used here as recklessness. What is the difference between negligence and recklessness? They are both indicative of some

<sup>37</sup> *Storla v Spokane, Portland & Seattle Transp Co*, 136 Or 315, 297 P 367, 298 P 1065.      <sup>38</sup> *Cockerham v Potts*, 143 Or 80, 20 P2d 423.



character of conduct. They are descriptive of conduct so far as our consideration of it is concerned. Negligence being simply the failure to exercise due care under all of the circumstances, I say to you that recklessness is the conscious failure to exercise due care. I may be engaged in some activity, driving a wagon, rolling a wheel barrow, riding a horse, or driving an automobile, I may not be giving that due attention to it that I ought to, I may not be exercising that due care which the law says I must exercise, and if my conduct is as characterized, we call that negligent conduct. If I should proceed in that conduct whatever I am doing with reference to another, to the point that I become conscious that I am not exercising that due care which the law says I must exercise, if I am conscious of it and continue in it and know that I am not exercising due care, I have passed beyond the realm of simple negligence and gone into that realm which we recognize as reckless, wanton or wilful, which are related terms. This plaintiff charges this defendant with recklessness, a conscious failure to exercise due care.<sup>39</sup>

#### Vermont

To be wilfully negligent, one must be conscious of his conduct, and although having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.<sup>40</sup>

#### Virginia.

(1) The court instructs the jury that the law of Virginia expressly prohibits any person from driving an automobile in such manner as not to have the same under complete control at all times, and declares that driving a car under such conditions will be deemed reckless driving. And if the jury believe that at the time of the accident or immediately before, the defendant G. was driving his car in such manner as not to have his car under complete control, then he is guilty of negligence as a matter of law. And if the jury believe that this negligence was the proximate cause of the accident or contributed to the accident, they should find a verdict in favor of the plaintiff.<sup>41</sup>

(2) A mere failure to skilfully operate an automobile under all conditions, or to be alert and observant, and to act intelli-

<sup>39</sup> Parker v Simmons, 163 SC 166 A 17  
42, 161 SE 169

<sup>41</sup> Gaines v Campbell, 159 Va  
504, 166 SE 704

<sup>40</sup> Hunter v Preston, 105 Vt 327,

gently and operate an automobile at a low rate of speed or mere inadvertence does not amount to wanton or reckless conduct, or constitute culpable negligence for which defendant would be responsible to an invited guest <sup>42</sup>

(3) The court further instructs the jury that to constitute wanton negligence, it is necessary that there be shown an entire absence of care of the safety of others which exhibits indifference to consequences <sup>43</sup>

(4) The court instructs the jury that in this case the deceased was a mere guest in the automobile, and it is the duty of the jury to find for the defendant, unless they believe from a preponderance of the evidence that the accident was caused by gross negligence of the defendant

And the court instructs the jury that gross negligence is that degree of negligence which shows an utter disregard of prudence amounting to a complete neglect of the safety of others <sup>44</sup>

#### Washington

Negligence is failure to use ordinary care. Gross negligence is failure to observe slight care. Whether the act or acts or any combination of acts on the part of the driver, G G, constitute gross negligence or want of slight care, and if so, whether this proximately caused an injury to O W becomes a question for your determination under all of the facts of the case <sup>45</sup>

#### Wisconsin.

To constitute gross negligence, there must be a wilful intent to injure, or such reckless and wanton disregard of the rights and safety of another or his property, and such willingness to inflict injury, as the law deems equivalent to such intent <sup>46</sup>

### § 394. — Negligence of plaintiff or operator of other vehicle as a defense. <sup>46a</sup>

#### California

Every person is responsible not only for the results of his wilful act, but also for an injury occasioned to another by the want of his ordinary care or skill in the management of his

<sup>42</sup> Young v Dyer, 161 Va 434, 170 SE 737

<sup>43</sup> Morris v Dame's Extr, 161 Va 545, 171 SE 662

<sup>44</sup> Ketchmark v Lindauer, 198 Va 42, 92 SE2d 286

<sup>45</sup> Wold v Gardner, 167 Wash 191, 8 P2d 975

<sup>46</sup> Benton v Brown, 186 Wis 629, 203 NW 380, 38 ALR 1417

<sup>46a</sup> See also § 482, *infra*

property or person, except so far as the latter has wilfully, or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined in other instructions.<sup>47</sup>

#### Connecticut.

Contributory negligence is not a defense to a cause of action for wanton misconduct. Should you find that the plaintiff has established his cause of action based upon wanton misconduct of the defendant, then you need not consider at all any claims of contributory negligence on the part of the plaintiff.<sup>48</sup>

#### Illinois

You are further instructed that if you believe from a preponderance of the evidence that the defendant was guilty of wilful and wanton conduct in the management and operation of said automobile, as alleged in said count, then contributory negligence on the part of the plaintiff—even if you should find from the evidence that she was guilty of contributory negligence—is not a defense to this action, and does not bar the plaintiff's right to recover in this case.<sup>49</sup>

#### Indiana.

I instruct you that if you find from the evidence that the plaintiff was himself guilty of wanton or wilful misconduct which contributed directly or proximately to his own injury, then he cannot recover.

[After reading statutes with respect to passing another vehicle and speed, the following instruction was given.]

The violation of such statutes may, depending upon the surrounding facts and circumstances, constitute wanton or wilful misconduct, and I instruct you that if you find from the evidence that the plaintiff herein violated either or both of the aforesaid statutes under such circumstances as would amount to wanton or wilful misconduct, and such violation contributed directly and proximately to his own injury, then the plaintiff cannot recover.<sup>50</sup>

#### Michigan.

I have already stated to you that to entitle the plaintiff to recover you must find, from a preponderance of the evidence,

<sup>47</sup> Nelson v Westergaard, 130 Cal App 79, 19 P2d 867

<sup>48</sup> Grant v MacLelland, 109 Conn 517 147 A 138

<sup>49</sup> Seiffe v Seiffe, 267 IllApp 23

<sup>50</sup> Pierce v Clemens, 113 IndApp

65, 46 NE2d 836

In the case cited, plaintiff, a guest in defendant's automobile, was driving the same at defendant's request. He alleged that defendant pulled out the throttle and caused the automo-

that the plaintiff himself was free from contributory negligence. Contributory negligence in order to constitute a defense must have been negligence contributing to the injury itself, for which the action is brought. Contributory negligence is such action as contributes by direct consent to or participation in the injury complained of. One can not recover for an injury caused by another if his own negligence contributed thereto. Where a party by his own negligence contributes to his own injury, he can not recover, excepting where the defendant is guilty of gross negligence, and there is no claim of gross negligence in this case.<sup>51</sup>

#### South Carolina

The defendant says by her answer here that she denies that she was negligent or reckless and denies that any such conduct on her part was the proximate cause of any injury sustained by this plaintiff. She says that if the plaintiff sustained any injury or damage to his person, it was due to his own negligence. She says that if he sustained any injury it was not her fault, it was not her negligence, or recklessness that caused it, but that his own negligence caused it. And further than that she says by way of defense and pleads of contributory negligence that while she denies that she was guilty of negligence as she is charged here, yet she says even if she was guilty at the time of negligence as charged against her, yet she says that the plaintiff himself was guilty of negligence and that if it had not been for the negligence of the plaintiff combining and concurring with the negligence which is charged against her and contributing to the injury complained of as the proximate cause of that injury it wouldn't have happened. That is what she means by the plea of contributory negligence. She says "While I deny that I was negligent, yet if I was negligent you the plaintiff were negligent also, and if it had not been that your negligence combined and concurred with the negligence you charge against me and contributed to the injury as a proximate cause of the injury it wouldn't have happened. If you had not been negligent and contributed to that injury it wouldn't have happened, your negligence combining with mine." Contributory negligence is an affirmative defense; by the measure of proof that it takes to establish negligence by the plaintiff against the defendant, by the same measure does it take to

bile to travel at a high rate of speed and run off the road. It was claimed that plaintiff himself was guilty of wilful and wanton misconduct in his manner of driving the automobile while passing another car.

Definitions of "wanton" and "wilful," see *Bedwell v DeBolt*, 221 Ind 600, 50 NE2d 875, *Hoesel v Cain*, 222 Ind 330, 53 NE2d 165.

<sup>51</sup> *Flannigan v Harder*, 268 Mich 564, 256 NW 549.

establish contributory negligence by the defendant against the plaintiff.

Where contributory negligence is made out, where the plea of contributory negligence is made out by the evidence and by the greater weight of the evidence it is a complete bar to any recovery predicated upon charges of simple negligence, but contributory negligence is not a bar to recovery for wilfulness, for a wilful act. Contributory negligence is not a bar to a recovery for a reckless act. This defendant pleads contributory recklessness and by that plea she says that while I deny that I was reckless, yet I say if I was reckless or negligent at that time, yet by my plea of contributory recklessness I say to you, the plaintiff was also reckless and if it had not been for your recklessness combining and concurring with that recklessness which you charge against me and contributing to the injury as a proximate cause, it wouldn't have happened.

Contributory recklessness is an affirmative defense, in order to establish it, it must be made out by the evidence and by the greater weight of the evidence. I say to you that contributory recklessness is a complete bar to charges predicated upon charges of recklessness. I say to you that if an injury has its origin in negligence on the one side and negligence on the part of the other side, the two come together combining and concurring, and there is only negligence involved, the law says that one offsets the other, the law leaves them where it found them. Proximate cause meets proximate cause. If an injury has its origin in recklessness on the one side and also on the other side, recklessness in the plaintiff and defendant, and the two combine and concur to produce the injury, the one offsets the other. Contributory negligence doesn't offset recklessness. Contributory negligence on the part of the plaintiff doesn't offset recklessness on the part of the defendant. But contributory recklessness does offset recklessness. Proximate cause meets proximate cause. If an injury has its origin in the negligence of the plaintiff and the defendant, then proximate cause meets proximate cause. If an injury has its origin in the recklessness of the defendant and in the contributory negligence of the plaintiff there would be no proximate cause meeting proximate cause. Because contributory negligence is not a bar to recovery for a reckless act. If the plaintiff was guilty of contributory recklessness, that would bar a recovery predicated on recklessness on the part of the defendant as charged.<sup>52</sup>

<sup>52</sup> *Parker v. Simmons*, 163 SC 42, 161 SE 169.

**§ 395. — Who is a guest under guest statutes.****California.**

Where, however, the driver receives some compensation which is the chief inducement for the rider's transportation, and which is given and received as compensation, and as a business transaction, such a rider is a passenger, not a guest

However, the mere sharing of expenses of a motor trip, such as for gasoline and oil, does not, in and of itself, cause the rider, who pays part of such expense, to be a passenger, rather than a guest. If such a contribution is the motivating influence for furnishing the transportation, if the arrangement has the character of a business transaction, then the payment is compensation for the ride, and one who thus rides and pays is a passenger, but if the purpose of the trip is merely the joint pleasure of the participants, if that objective is what led to the trip as a social occasion, and the sharing of expenses is merely incidental, then one who thus rides with the driver, although sharing in the expense, is a guest.

If the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the riders are passengers and the driver is liable for ordinary negligence and this is true whether the trip was a social trip for the joint pleasure of the participants or of a non-social nature <sup>53</sup>

**Ohio.**

(1) It is admitted by both parties to this action that the plaintiff, at the time she claims to have been injured, was riding as a passenger in the automobile [owned and] driven by the defendant. Since there is no claim on the part of the plaintiff that there was any joint adventure between plaintiff and defendant, nor that the transportation of the plaintiff was on account of any business project of the defendant or for his benefit in any manner, her transportation was clearly for her benefit.

The question then arises as to whether or not such transportation was without payment therefor. If it was without payment, or an express or implied agreement to pay, plaintiff cannot recover in this action. Under a statute of this state, the owner or operator of a motor vehicle is not liable for damages resulting from the injuries of a guest while being transported without payment therefor, unless such injuries are

<sup>53</sup> Hart v Chaffin, 144 CalApp2d 326, 300 P2d 905

caused by the wilful or wanton misconduct of such operator or owner. In other words, such owner or operator is not liable for mere negligence. The plaintiff makes no claim of any act or omission on the part of defendant constituting wilful or wanton misconduct on his part, and no evidence has been introduced in this action of any such misconduct.

The plaintiff claims that her transportation was not without payment. In short, she claims that she paid [or, agreed to pay] for such transportation. Defendant, on the other hand, denies that claim of the plaintiff.

This claim of the plaintiff and denial of the defendant makes an issue of fact for your determination. The court instructs you that the burden is upon the plaintiff to prove by a preponderance of the evidence—as I have defined that term to you—that she paid [or agreed to pay] for the transportation.

Such an agreement to pay might be express or implied, but no implied contract or obligation to pay may come into effect by reason of the mere payment of a small sum, unless such payment was made under such facts and circumstances as would raise an inference of the intention of the motorist to charge for the transportation.

Unless you find, by a preponderance of the evidence, that there was payment, or an express or implied agreement to pay, for the transportation, your verdict must be for the defendant.

On the other hand, if you find by a preponderance of the evidence, that there was payment, or an express or implied agreement to pay, for the transportation, you will then go further and consider the question of whether or not defendant was negligent in one or more of the particulars alleged in the petition. Defendant denies these allegations of negligence set forth in the petition. There again, the burden would be upon the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of one or more acts or omissions set forth in the petition, which she claims constitutes negligence on the part of the defendant.<sup>54</sup>

(2) A guest is one who is invited, either directly or by implication, to enjoy the hospitality of the driver of a car, who accepts such hospitality and takes a ride either for his own pleasure or on his business without making any return to or conferring any benefit upon the driver of the car other than the mere pleasure of his company.

<sup>54</sup> See *Hasbrook v Wingate*, 152 OhSt 50, 39 OhO 372, 87 NE2d 87. In the case cited, plaintiff was the defendant's mother-in-law, and

If you find from a preponderance of the evidence that the plaintiff's decedent, at the time of the accident which is alleged to have resulted in his death, was riding in the automobile of the defendant in compliance with the request of the defendant that the decedent, W W, enter the car and accompany the defendant for the purpose of pointing out the home of H S which defendant desired to find, and that was the only purpose for which the decedent was riding in the automobile driven by the defendant at the time of the collision, then I say to you, the benefactor here was not the defendant, but the decedent, and the decedent, W W was an invitee for the benefit of the defendant, and the benefit was tangible. If this be true, the defendant cannot claim the benefit of the guest statute, and he was required to exercise ordinary care for the safety of the decedent, W W.

It is for you to determine, under the facts and circumstances as shown by the evidence in this case, as to whether or not the decedent was a guest, as I have defined that term to you.<sup>55</sup>

### § 396. — Contributory negligence of passenger; in general.

#### Indiana

It can not be said as a matter of law that such guest or passenger is guilty of negligence merely because he has done nothing. In many such cases the highest degree of caution may consist of inaction. In situations of great and sudden peril, meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings, may be exceedingly disastrous in its results. While it is

lived in his home at the time of the accident. They had traveled together to work for a period of two or three years in the defendant's car. At irregular intervals, usually when the defendant was buying gasoline for his car, the plaintiff paid him the average sum of one dollar every two weeks. The Supreme Court reversed a judgment for the plaintiff and entered final judgment for the defendant, on the ground that the evidence did not show any intention on the part of the defendant to charge, nor of the plaintiff to pay, for the transportation.

The foregoing instruction would be proper, based on the decision of

the court, where there is evidence of intention to charge for the transportation.

<sup>55</sup> Dorn v North Olmstead, 133 OhSt 375, 11 OhO 31, 14 NE2d 11.

In the case cited, it was held that where a person is invited to get into a motor vehicle by the driver thereof for the sole purpose of pointing out to the latter the location of a house a short distance away, and where the ride is wholly incidental to the purpose of showing the driver the location of such house, such invitee is not a guest, and the driver owes to him the duty of exercising ordinary care in the operation of the motor vehicle.



true that it is the duty of such guest or passenger not to submit himself and his safety solely to the prudence of the driver of the vehicle, and that he must himself use reasonable care for his own safety, nevertheless he should not, in every case, be held guilty of contributory negligence merely because he has done nothing. If there be threatened danger which is known to the passenger and unobserved by the driver, the passenger would be guilty of negligence if he failed to notify and warn the driver; also, if the driver be careless or reckless in his conduct, and this is known to the passenger, and there be reasonable opportunity to do so, it would be the passenger's duty to caution the driver and remonstrate with him, and, if he persisted in his improper conduct to leave the vehicle, but manifestly that would not be possible, nor could it be required, in every case.<sup>56</sup>

#### Michigan

The plaintiff in order to recover in this case, must prove by a preponderance of the evidence that the defendant driver, on the occasion in question, was guilty of negligence, or, in other words, that he failed to conduct himself as an ordinarily prudent person would have done under similar circumstances, and that such negligence was the direct or proximate cause of the injury complained of. Secondly, the plaintiff must prove by a preponderance of the evidence that he himself was free from negligence which contributed to the injury

I have already told you, gentlemen of the jury, as I understand it, that if you find that the plaintiff in this case, or the driver of the truck in which the plaintiff was riding, was guilty of any negligence which contributed to this injury, the plaintiff cannot recover, I think I said that to you, but that is the law<sup>57</sup>

#### Pennsylvania

The three lady guests in the automobile driven by Mr V cannot be charged with negligence on account of the negligence of Mr. V, the driver. However, you will examine the conduct and actions of the women plaintiffs (passengers) in order to determine whether or not they or any one of them was guilty of any negligence which contributed in any way to this accident. As I say, they were not driving the car. Under the law a guest is not required to be looking ahead as is demanded of a driver, but when danger is known to the guest, or is reasonably mani-

<sup>56</sup> Cortez v Marland Ref Co, Superior Court, Lake County, Indiana, No 551

<sup>57</sup> Pilch v Yellow Taxicab Co, 225 Mich 484, 196 NW 365

fest to the guest, if such danger confronts the driver and the guest has adequate and reasonable opportunity to control or influence the situation for safety, then such guest cannot sit by without warning and permit herself to be driven to her injury, because if she does, she is guilty of contributory negligence which would bar recovery. If the guest knows there is danger, or the situation is such that she must have known there was danger, then the guest must protest to the driver or warn him if there is time and opportunity to do so. A guest is not required to warn a driver of what the driver already knows and appreciates.<sup>58</sup>

**§ 397. — Imputed negligence; joint enterprise.**

**California**

(1) Parties can not be said to be engaged in a joint enterprise within the meaning of the law of negligence, unless there is a community of interest in the objects or purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.<sup>59</sup>

(2) If you find from the evidence that the plaintiff H, at the time of the collision, was a passenger or guest in the automobile of B, and that he had no right of control over said automobile, and was not at the time directing or controlling its movement, then the negligence of B, if there was any negligence on his part, cannot be imputed to plaintiff, H, and if, under these circumstances the driver, B, was negligent, that negligence, if any, cannot defeat a recovery by the plaintiff H, provided the negligence of the defendant S, if any, was the sole proximate cause of the injury or combined with the negligence of B, if any, in causing an injury to said plaintiff, and provided further that plaintiff himself was in the exercise of ordinary care.<sup>60</sup>

(3) If you believe from the evidence that the plaintiff was riding in the automobile as a guest of the operator thereof, and if you further believe from the evidence that she had neither the control over the running of the same, nor the right to control the driver or operation of the said automobile, then I instruct you that the negligence, if any, of the driver of the

<sup>58</sup> *Vortasefski v Pittsburg R Co*, 363 Pa 220, 69 A2d 370, affirming judgment on verdict for plaintiffs

<sup>59</sup> *Curran v Earle C Anthony, Inc*, 77 CalApp 462, 247 P 236

<sup>60</sup> *Huber v Scott*, 122 CalApp 334, 10 P2d 150

automobile in which plaintiff was riding can not be imputed to plaintiff in this case <sup>61</sup>

(4) You are instructed that this is an action prosecuted both by the husband and the wife. The undisputed testimony of the plaintiff is that the husband was driving the car at the time and place of the accident. Under the law of this state the negligence of the husband is imputed to the wife. That is to say, that if the husband, in law and in fact, was guilty of negligence, then the wife, in law and in fact, was guilty of negligence, and if the negligence of the husband, the driver of the car, directly or proximately contributed to the happening of the accident, in any degree, however slight, your verdict will be for the defendants, notwithstanding the fact you may believe that the defendants themselves were guilty of negligence at the time and place of the accident. <sup>62</sup>

(5) When the court in these instructions has used or may use the word "plaintiff" in connection with her duty to use ordinary care, or with reference to any contributory negligence upon her part, you are to understand that it includes also any negligence or want of ordinary care upon the part of her son in the operation of the automobile as his negligence, if any, is to be imputed to plaintiff. <sup>63</sup>

#### Colorado

To establish a joint enterprise such as would justify imputing to an occupant of an automobile the negligence of the driver, it must appear that the occupant did in fact exercise control over the driver, or that the circumstances were such as to justify the inference that the occupant had the right to exercise such control over the driver, or that the occupant and the driver jointly were controlling the operation of the automobile or had a right jointly to control its operation. <sup>64</sup>

#### Connecticut

If you find that the defendant K, and the driver of the Buick car, M, were both guilty of negligence, the negligence of the driver of the Buick car, M., cannot be imputed to the plaintiff, and your verdict should then also be for the plaintiff, if the jury find the negligence of K and M was the proximate cause of the accident. <sup>65</sup>

<sup>61</sup> *Walters v Du Four*, 132 Cal App 72, 22 P2d 259, 23 P2d 1020 355, 260 P 894

<sup>64</sup> *Parker v Ullom*, 84 Colo 433,

<sup>62</sup> *Power v Crown Stage Co*, 82 CalApp 660, 256 P 457 271 P 187

<sup>63</sup> *Alkus v Davies*, 86 CalApp

<sup>65</sup> *Sullivan v Krivitsky*, 100 Conn 508, 123 A 847

**Georgia**

(1) Notwithstanding the negligence of the husband in operating the automobile may have jointly concurred with the negligence of the defendant in proximately causing the plaintiff's injuries, plaintiff can recover of the defendant if otherwise entitled to recover <sup>66</sup>

(2) I charge you, gentlemen of the jury, that if you find in this case under the evidence that Mrs. B., the plaintiff, was a passenger, or, in this case, a guest in the automobile which was driven by her husband, C. L. B., and that she had no control of the movements of the automobile and was not the owner of the automobile, that any negligence, if any, of Mr. B. would not be attributable or imputable to her <sup>67</sup>

**Illinois**

(1) The court instructs the jury that even if you believe from the evidence in this case that the driver of the automobile in which the plaintiff had been riding was guilty of negligence which contributed to the injury in question, if any, still, if you further believe from the evidence that the plaintiff was not by her own conduct, in any way, the cause of such negligence on the part of the driver of the automobile in which plaintiff had been riding, and omitted no reasonable or ordinary care on her part for her own safety under all the circumstances in evidence before you, then such negligence, if any, on the part of the driver of said automobile in which plaintiff had been riding cannot be charged against or imputed to the plaintiff in this suit. <sup>68</sup>

(2) You are instructed that while O. O. must prove that she exercised ordinary care at and prior to the time of the collision in question, yet you are further instructed that a driver's negligence cannot be imputed to a guest riding in the car, and in this case, even if you find that M. M. was negligent in some respect, you are instructed that her negligence, if any, cannot be charged against or imputed to O. O. <sup>69</sup>

(3) The court instructs the jury that if you believe from the evidence in this case that at the time the accident occurred, the car of the plaintiff was being driven by the witness L., for the plaintiff, or under the plaintiff's direction and control, and if you further believe from the evidence that the said L., in driving said car, negligently drove to the south side of the center line of the road, and that the act of L. in so driving said car

<sup>66</sup> *McCord v. Benford*, 48 GaApp 482, 144 NE2d 813  
738, 173 SE 208

<sup>67</sup> *McBrayer v. Ballenger*, 94 Ga App 620, 95 SE2d 718

<sup>68</sup> *Nowak v. Witt*, 14 IllApp2d

<sup>69</sup> *Ohlweiler v. Central Engineering Co.*, 348 IllApp 246, 109 NE2d 232

contributed to the injury complained of, then under such state of proof the plaintiff cannot recover, and you should find your verdict for the defendant <sup>70</sup>

#### Indiana

(1) If you find from the evidence that the plaintiff and other members of the party in the automobile in which the plaintiff was riding, including the driver, prior to the accident had been engaged in acting in a theater of Greenfield, Indiana, and that at the time of the accident they were returning from Greenfield to Indianapolis en route on a common enterprise, then the negligence, if any, of the driver of the automobile in which the plaintiff was riding at the time of the accident and prior thereto, if any, would be imputed in law to the plaintiff, and, if you find, from a fair preponderance of the evidence that the negligence and carelessness, if any, of said driver proximately contributed to the accident and the resulting injuries to the plaintiff then such negligence would be imputed to the plaintiff and would defeat his recovery. And if you so find, your verdict should be for the defendant <sup>71</sup>

(2) If you find from a fair preponderance of the evidence that the plaintiff, at the time of the accident complained of, was riding in an automobile with her husband, and that she and her husband were engaged in a common purpose, or joint enterprise, and that said automobile was being driven for and on account of that common purpose or joint enterprise, then I instruct you that the negligence, if any, of the husband of the plaintiff may be imputed to the plaintiff, and if you further find that such negligence of the plaintiff's husband, if any, was the proximate cause of the injuries complained of in the plaintiff's complaint, then your verdict should be for the defendant. But the common enterprise of riding is not of itself sufficient to warrant imputing the negligence of the driver to the plaintiff. In order to do so, you must find from the evidence that the plaintiff and her husband together had such control and direction over the truck in which she was riding as to be practically in the joint or common possession of it. Parties can not be said to be engaged in a joint enterprise unless there is a community of interest in the object or purposes of the undertaking, and an equal right to direct and govern the movement of each other with respect thereto. Each must have some voice and right to be heard in its control and management although it is not necessary that she

<sup>70</sup> Bunch v McAllister, 266 IllApp 248

<sup>71</sup> Indianapolis Glove Co v Fen-

ton Superior Court, Marion County, Indiana, No 39625, see 89 IndApp 173, 166 NE 12

actually exercise her right of control, if she actually had the right of control <sup>72</sup>

#### Iowa

In order to warrant the jury in finding the plaintiff guilty of contributory negligence by reason of imputed negligence on the part of the driver of the car in which plaintiff was riding at the time she received her injury, it must be shown that the plaintiff and the driver of the automobile were engaged in a common enterprise and that the plaintiff had some control over the driver of the automobile used by them. It would not be sufficient to show that they were riding together on a common enterprise, but it must be shown that the plaintiff had some control and management of the car or the driver of the car. And, if such control and management of the car was wholly vested in the driver of the same, then negligence on his part would not be contributory negligence on the part of the plaintiff <sup>73</sup>

#### Kentucky

An invitee riding in a vehicle driven by the owner or his servant or agent is not responsible for the negligence of the driver <sup>74</sup>

#### Maryland

The jury are instructed that if they find from the evidence that on or about December 16, 19—, the plaintiff was a passenger in the ——— bus of the defendant, the C & W T. Co., and that while she was such passenger, the plaintiff was injured by reason of a collision between said bus and a truck, which was operated by the defendant, the A O Co., its servant or agent, on a public road between Frostburg and Lonaconing, in Allegany County, Maryland, and that the plaintiff's injury resulted directly from the want of ordinary care and prudence on the part of the defendant, the A O Co., its servant or agent, and not from the want of ordinary care and prudence on the part of the plaintiff directly contributing to the accident, then the plaintiff is entitled to recover as against the defendant, the A O Co. <sup>75</sup>

#### Massachusetts

If there was no negligence on the part of B [plaintiff] which contributed to the injury, then there is nothing in his conduct

<sup>72</sup> Grove v Rubach, Superior Court, Lake County, Indiana, No 2158f

<sup>73</sup> Fry v Smith, 217 Ia 1295, 253 NW 147. See also Sutton v Moreland, 214 Ia 337, 242 NW 75

<sup>74</sup> Consolidated Coach Corp v Saunders, 229 Ky 284, 17 SW2d 233

<sup>75</sup> Cumberland & Westernport Transit Co v Metz, 158 Md 424, reargden 158 Md 424, 149 A 4, 565

to prevent him from recovering. Furthermore, in that event, in the event of there being no contributory negligence on the part of the plaintiff found—in that event, it is immaterial whether C's [the driver of the car in which plaintiff was riding] driving the automobile was negligent or not. C's conduct becomes important only if you find there was a want of due care on the part of B in looking out for himself, but if there was no negligence on the part of B in looking out for himself, then it is immaterial, in that event, whether C. was negligent or not.<sup>76</sup>

#### Michigan

The passenger must show that whoever was driving the car was not negligent. The negligence of Wegusen would be imputed to Mrs. Werner in this case, so in order to show that she was free from negligence here she must show that Wegusen was driving in a careful and prudent manner at the time he was crossing this intersection. If she shows that Wegusen was not guilty of any negligence in the manner in which he drove across that intersection, that is, if that testimony preponderates in her favor, and if she has established that D was guilty of negligence, the proximate cause of the accident, then she is entitled to recover. If she has failed to show either one of these issues by evidence which preponderates in her favor, then she is not entitled to recover.<sup>77</sup>

#### Minnesota

(1) As the plaintiffs were passengers, the negligence, if any, of the driver of the car in which they were riding, is not imputable to them, and plaintiffs were not guilty of contributory negligence.<sup>78</sup>

(2) I may say to you that if you find that V. J. was the agent of J. J. F. in the pursuit of the purposes of said intended trip to Moritz at the time of the accident, and, if you further find that said V. J. was negligent in the matter of the operation of the J. car at and immediately before the happening of the accident and that said negligence of V. J. proximately contributed to the accident and death of the said J. J. F., then said negligence of V. J. while acting as agent for J. J. F. is imputed to J. J. F., and in that case plaintiff cannot recover.<sup>79</sup>

#### Missouri

The court instructs the jury that if you find and believe from the evidence that the plaintiff was not the owner of the

<sup>76</sup> Barry v Harding, 244 Mass 588, 139 NE 298

<sup>77</sup> Werner v Wegusen, 252 Mich 41, 232 NW 744

<sup>78</sup> McIlvaine v Delaney, 190 Minn

401, 252 NW 234. See also Pearson v Northland Transp. Co., 184 Minn 560, 239 NW 602.

<sup>79</sup> Harris v Raymer Hdw. Co., 189 Minn 599, 250 NE 577.

automobile in which she was riding and was not operating said automobile, but was merely the guest of the driver, the negligence of the driver, if any, cannot be imputed or charged to this plaintiff <sup>80</sup>

#### Nebraska

(1) Negligence on the part of the plaintiff's husband, from the mere fact alone that plaintiff's husband was driving the car, would not be considered in law, the negligence of the plaintiff herself, nor affect in any degree her right, if any, to recover, as the wife is ordinarily considered a passenger in the car driven by her husband, and not chargeable with the direction, control, nor manner of driving. <sup>81</sup>

(2) The court instructs the jury that, if you find and believe from the evidence that O. R. was driving the automobile in which plaintiff was riding at the time and place of the collision, and that the said O. R. was then and there guilty of carelessness and negligence in that connection and which is shown by the evidence in the case, and which caused or contributed to cause the collision, said carelessness and negligence of the said O. R., if you find he was careless and negligent, is not to be imputed to the plaintiff or held against his right to recover herein, unless you further find and believe from the evidence that the plaintiff and the said O. R. were engaged in a joint enterprise. By joint enterprise is meant not merely that they were riding together in the same vehicle. Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects and purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereto <sup>82</sup>

#### New Jersey

One who, while riding in the private conveyance of another, is injured by the negligence of a third party may recover against the latter, notwithstanding that the negligence of the driver of the conveyance in driving his auto contributed to the injury, where the person injured is without fault, and has no authority over the driver

So you see, gentlemen, if the deceased, Mr. L., had no authority over the driver, and was not negligent himself, and the relation of master and servant or principal and agent or

<sup>80</sup> Stevens v Westport Laundry Co., 224 MoApp 955, 25 SW2d 491. See also Banker v Wells (MoApp), 274 SW 939.

<sup>81</sup> Stevens v Luther, 105 Neb 184, 180 NW 87.

<sup>82</sup> Wortman v Zimmerman, 119 Neb 682, 230 NW 588.



mutual responsibility in a common enterprise did not exist, then it does not make any difference how negligent the boy was, and that negligence could not be imputed to the father <sup>83</sup>

#### New York

Plaintiff, sitting alongside the driver, was obliged to use that care and caution which the circumstances demanded of him, being in control of the driver and the vehicle. He was obliged on his own account to use reasonable care and due regard for those who had a right to be upon the street and had equal rights with himself. <sup>84</sup>

#### Ohio

(1) In the state of Ohio, we do not have the doctrine of imputed negligence. So that any negligence, the negligence upon the part of the driver of the car—in which she was riding—would not be imputed to her. She was riding as a passenger in the car. I said to you a moment ago that the driver of the car in which she was riding was guilty of negligence, and if you find by a preponderance of the evidence that that negligence was the sole cause of this collision, this plaintiff cannot recover in this action. If, however, on the other hand, she has proven defendant was guilty of negligence, and that that negligence upon the part of defendant either directly and proximately caused the collision, or directly and proximately contributed to cause the collision, then she is entitled to recover in this action. <sup>85</sup>

(2) Now, if Mr. R was negligent and that negligence proximately contributed to this accident, that negligence on his part would be of no significance whatever, unless he was acting at the time as agent for Mrs. R in the operation of that car. Admittedly the plaintiff, Mrs. R, owned the motor vehicle which her husband was driving. The property right to the motor vehicle was in Mrs. R. This fact, under our law, gives rise to a presumption that he was acting as her agent in the operation of the plaintiff's motor vehicle. This presumption is not a conclusive presumption, however. It is a rebuttable presumption. It may be overcome or rebutted by other evidence. But if it has not been rebutted by other evidence, then you shall consider he was her agent in the operation of the motor vehicle. When I speak of a presumption in this connection, I mean an inference of fact.

The test for determining whether one person is an agent for another in this connection is whether said alleged agent has the

<sup>83</sup> *Lange v New York, S & W R Co*, 89 NJL 604, 99 A 346. 920

<sup>84</sup> *Farrell v Fire Ins. Salvage Corps*, 190 AppDiv 945, 179 NYS

<sup>85</sup> *Schreiber v Nat Smelting Co*, 157 OhSt 1, 104 NE2d 4

right to exercise control over the other as to the work being done

1 4 \* If the status of Mr R was that of an agent for his wife, as he operated her motor vehicle, then his conduct in all respects becomes her conduct in law. In that situation she is chargeable with his driving. His driving becomes her driving in that situation and, if he was negligent in the operation of the car in that situation, his negligence becomes her negligence. On the other hand, if his status was not that of an agent for his wife in driving her motor vehicle, his conduct in the operation of the motor vehicle does not become her conduct and she would not be chargeable with it <sup>86</sup>

#### Oregon

(1) I instruct you that it is the duty of every automobile driver while driving upon the public highways of this state to operate his car in a reasonably prudent and careful manner, taking into consideration the clemency or inclemency of the weather and all other circumstances and conditions then prevailing, and if you find from the circumstances in this case, prevailing at the time this accident occurred, that a reasonably prudent and careful driver, in the exercise of reasonable care and caution, would have had his car under such control as to have been able to avoid a collision with the trailer attached to the defendant's truck, then I instruct you that the driver of the car in which plaintiff was riding was guilty of negligence, and if you find that plaintiff was engaged in a joint venture with said driver at the time this accident occurred, then such negligence is imputed to plaintiff and he cannot recover in this case <sup>87</sup>

(2) If you should find that the collision was due partly to the negligence of the defendant Holland and partly to the negligence of the driver of the car in which plaintiff, K A W, rode, and that such negligence was the proximate cause of the injury in this collision, your verdict must be in favor of K, the plaintiff, and against the defendant, because it is the law that a child is not responsible or chargeable with any actions of the person driving the car in which she was a passenger <sup>88</sup>

#### South Carolina

The jury is charged that the negligence of the driver of an automobile is not imputable to an occupant of the car, unless the relation of master and servant exists between the passenger and

<sup>86</sup> Ross v Burgan, 163 OhSt 211, 612, 282 P 768, 283 P 1119  
126 NE2d 592

<sup>88</sup> Whisnant v Holland, 206 Or

<sup>87</sup> Hickerson v Jossey, 131 Or 392, 292 P2d 1087

the driver, or unless they are engaged in a common enterprise, or unless the driver has the custody of a person such as an infirm person or an infant. This is the common-law rule enforced in this state. This rule, however, is modified by the statute which I will read to you to the extent that if the jury should find that the person having charge of his person or property was at the time of the collision guilty of gross or wilful negligence or was acting in violation of the law and that such gross or wilful negligence or unlawful act contribute to the injury <sup>89</sup>

#### Utah

The negligence of the driver of a car is not imputable to a guest or invitee who is not jointly responsible for the operation of the car <sup>90</sup>

#### Virginia

(1) The negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver <sup>91</sup>

(2) In order that the negligence of the driver in operating an automobile may be imputed to a person riding therein with him on the ground that they are engaged in a joint enterprise, it is not sufficient that they have a mutual or joint interest in the objects and purposes of the trip. There must be a joint enterprise as hereinafter defined in controlling, directing, and governing the operation of the automobile. The relationship between the parties arising from the engagement, express or implied, between them, must be such that each of them has, or is, entitled to exercise a voice as to the manner in which the automobile shall be controlled and operated while making the trip. If the relationship between the parties is such that each is entitled to exercise a voice in the control and operation of the automobile, it is not material that the one not driving does not know how to operate an automobile, or has no opportunity actually to control the conduct of the driver, or that it has been expressly agreed or is necessarily understood that he will not interfere with the driver in the control and operation of the automobile. But the engagement between the parties must have given rise to a relationship between them such that each is entitled to a voice in the control and operation of the automobile <sup>92</sup>

<sup>89</sup> Brogdon v Northwestern R Co, 141 SC 238, 139 SE 459

Parker, 152 Va 484, 147 SE 461

<sup>90</sup> Balle v Smith, 81 Utah 179, 17 P2d 224

<sup>92</sup> Miles v Rose, 162 Va 572, 175 SE 230.

<sup>91</sup> Norfolk & P B L R Co v

## § 398. — Sole negligence of operator.

**Indiana**

If the driver of the automobile in which plaintiff was riding upon the occasion complained of, was guilty of negligence and if such negligence was the sole proximate cause of the injuries complained of, or if such negligence of such driver and the negligence of the plaintiff, if any, were the causes of such condition, then, under such circumstances, the plaintiff would not be entitled to recover and your verdict should be for the defendant <sup>93</sup>

**Kentucky**

The negligence, if any, of the driver of the automobile in which plaintiff was riding, in failing to perform some one or more of the duties required of him by instruction No. 2, is not attributable to the plaintiff, M. S., unless you believe from the evidence that such negligence, if any there was upon his part, was the sole cause of the collision between said two automobiles, and the injuries, if any, to the plaintiff, in which event the law is for the defendant, L. K., and you will so find. <sup>94</sup>

**Maryland**

If you find from the evidence in this case that the accident of which the plaintiff complains was caused solely through negligence or want of ordinary care on the part of the driver of the bus in which plaintiff was riding, then your verdict must be for the defendant. <sup>95</sup>

**Missouri**

(1) The court instructs you that if you find and believe from the evidence that at the time and immediately prior to the collision mentioned in evidence, the taxicab mentioned in evidence was being operated at a rate of speed which was excessive and that said excessive and dangerous speed, if any, of said taxicab was the sole cause of said collision, then your verdict must be in favor of defendant T. <sup>96</sup>

(2) The court instructs the jury that the driver of the automobile mentioned in evidence, was, under the law, bound to exercise the highest degree of care in the operation of the automobile at the time and place in question, that is, such care as a very

<sup>93</sup> Hammel v Indiana Taxi Co, Circuit Court, Marion County, Indiana, No 36186

<sup>94</sup> Sweazy v King, 248 Ky 432, 58 SW2d 659 See also Consolidated Coach Corp v Saunders, 229 Ky 284, 17 SW2d 233.

<sup>95</sup> Cumberland & Westernport Transit Co v Metz, 158 Md 424, 149 A 4, 565

<sup>96</sup> Smith v Star Cab Co, 323 Mo 441, 19 SW2d 467 See also Felts v Spesia (MoApp), 61 SW2d 402.

careful and prudent person would exercise under the same or similar circumstances. In this connection, you are further instructed that if you find and believe from evidence that, under all the circumstances shown in evidence, the driver of said automobile drove said automobile eastwardly on Angelica Avenue into the intersection of that avenue and Twentieth Street, and if you further find and believe that in so driving, the driver of the automobile drove said automobile into the side of a south-bound bus then and there operating southwardly on Twentieth Street when the driver of the automobile saw, or could have seen, in the exercise of the highest degree of care, that there was danger of collision between the two vehicles, if you so find, and could have avoided such collision by stopping, slowing, slackening or swerving his automobile but failed to do so; and if you further find in so doing the driver of said automobile failed to exercise the highest degree of care, and that such failure, if you so find, was the sole cause of the collision and whatever damages, if any, plaintiff sustained on the occasion in question, and that such alleged damages, if any, were not due to any negligence on the part of the operator of the bus in any of the other instructions set out herein, then, in that event, plaintiff is not entitled to recover and your verdict must be in favor of the defendant.<sup>97</sup>

#### North Carolina

If you find from the evidence that the sole and proximate cause of plaintiff's injury was due to the negligence of the driver of the automobile occupied by her, in turning around on Highway No 20 in the night-time, at the point where he did turn around, and that this, and this alone, was the proximate cause of her injury, you should answer the first issue "No."<sup>98</sup>

#### North Dakota

There is some evidence in the record to the effect that the plaintiff, M M, was at the time of the occurrence in question a guest or passenger in the automobile which it is claimed was driven by said O M, and I charge you that where a passenger or guest is riding with another in an automobile and such person has no control over the vehicle and does not in any manner manage or control the same, that such person cannot be guilty of contributory negligence even though it is found that the driver of the automobile in which such party was riding was at the time of the occurrence guilty of negligence in the driving and management of such automobile.

<sup>97</sup> Alwood v St Louis Public Service Co, (MoApp), 238 SW2d 868  
<sup>98</sup> Newman v Queen City Coach Co, 205 NC 26, 169 SE 808.

And so I charge you that the fact that the plaintiff, M. M., was at the time of the collision a passenger or guest in an automobile driven by her husband that the negligence of her husband in driving such automobile, if there was any negligence on his part, cannot be imputed to the plaintiff, M M, and if under such circumstances the driver of such automobile was guilty of contributory negligence, if you should find it existed, that cannot defeat a recovery by the plaintiff, M M, provided the negligence of the defendant, K E Co, if any, combined with the negligence of her husband at the time, if there was such negligence, caused the injury to said plaintiff. But if you find that the negligence of her husband at the time of the occurrence was the sole cause of the accident, you must find for the defendant <sup>99</sup>

#### Oklahoma

Even though the negligence, if any, of the driver of the car in which the plaintiff was riding, was not imputable to the plaintiff, yet if you find from the evidence that the injury of the plaintiff was caused wholly and solely by the negligence of the said M C, driver of the car in which plaintiff was riding, and that the driver of the Buick car, being the defendant's car, was without fault, it would be your duty to return a verdict in favor of the defendant

If you find from the evidence that the driver of the car in which the plaintiff was riding, failed to use reasonable care in attempting to pass other vehicles driven in the same direction and in the course of such attempt collided with defendant's car through no fault of defendant's driver and you further find that the plaintiff was injured in such collision then you are instructed that the negligence of the driver of the car in which the plaintiff was riding was the proximate cause of the injury and under such circumstances, you must return a verdict for the defendant <sup>1</sup>

#### Oregon

(1) If plaintiff's husband is shown to have been negligent and his negligence, if any, was the sole cause of the injury to plaintiff, your verdict should be for the defendant, for the defendant would not be responsible for injuries produced solely by the negligence of the husband <sup>2</sup>

(2) It is the duty of Mr B, the driver of the car in which the plaintiff was riding, to exercise ordinary care and it was the duty

<sup>99</sup> Morstad v Kopald Elec Co, Okl 209, 36 P2d 865  
60 ND 325, 234 NW 56

<sup>2</sup> Noble v Sears, 122 Or 162,

<sup>1</sup> Skaggs v Gypsy Oil Co, 169 257 P 809

also of Mr. B. to have his car under proper control and to keep a proper lookout for traffic, and if you find that Mr. B. did not do this and as a proximate and sole result thereof this accident happened, then the plaintiff cannot recover and your verdict must be for the defendants <sup>3</sup>

#### Virginia

(1) The court instructs the jury that if they believe from the evidence that the proximate cause of the injury suffered by these plaintiffs was solely due to the negligence of the driver of the car in which they were riding, then they should find for the defendant R. L. M. <sup>4</sup>

(2) The court instructs the jury That if you believe from all of the evidence in this case that D, the operator of the car in which plaintiff was riding, under all of the facts and circumstances existing at the time, was guilty of negligence which was the sole proximate cause of the accident and the resulting injuries to plaintiff, you cannot find your verdict for the plaintiff <sup>5</sup>

### § 399. — Care required of passenger generally.

#### Georgia

(1) While it is the duty of a person while riding as a guest of another in an automobile to exercise ordinary care for his own safety whenever he observes a danger to himself arising from the conduct of the operator of the automobile, no duty as a matter of law devolves in all instances upon the guest, where he observes that the operator of the automobile is operating in a negligent manner, to protest the manner in which the automobile is being operated <sup>6</sup>

(2) The negligence of the driver of an automobile is not imputable to a person riding therein merely as a guest or invitee, and such a guest may, until he has notice to the contrary, assume that neither the driver nor others upon the highway will be negligent, and may also assume that the driver will exercise the proper care to avoid the negligence of others, yet the guest can not close his eyes to known or obvious dangers arising either from the acts of the driver or from the acts of others, and, if there is a danger from either cause, and the circumstances are such that it would become apparent to a person of ordinary prudence in like circumstances, then it is the duty of the guest

<sup>3</sup> Brindle v McCormick Lbr & Mfg Corp., 206 Or 333, 293 P2d 221

<sup>4</sup> Miles v Rose, 162 Va 572, 175 SE 230

<sup>5</sup> Daniels v C I Whitten Transfer Co., 196 Va 537, 84 SE2d 528

<sup>6</sup> McCord v Benford, 48 GaApp 738, 173 S 208

to do whatever \* \* \* a person of ordinary prudence would or should do in the same or like circumstances.<sup>7</sup>

#### Idaho

The court instructs the jury that the defendant alleges in his answer that the deceased, J. H. M., was guilty of contributory negligence, that is, that he failed to exercise a reasonable care for his own safety and that that failure contributed to his own injury and death, and in this connection you are instructed that an occupant of an automobile is under no duty to anticipate that the driver will be negligent and the occupant has a right to rely upon the driver exercising reasonable care, so long as the occupant is exercising ordinary care on his own behalf under all of the facts and circumstances in the case.<sup>8</sup>

#### Illinois

(1) The court instructs the jury that the plaintiff was not relieved from the exercise of due care and caution merely because she was a guest in the automobile in which she was riding, but she was bound to use and exercise ordinary care and caution for her own safety. And if you believe from the evidence that the plaintiff at and immediately before her injury, failed to exercise ordinary care and caution for her own safety, which caused or contributed to her injury, or that she failed to use her senses and faculties to warn the driver of the automobile in which she was riding of approaching danger, and that her failure so to do under all the circumstances and conditions in evidence was negligence on her part, which caused or contributed to her injury, then the plaintiff cannot recover from the defendant, C. E. Co., and you should find said defendant not guilty.<sup>9</sup>

(2) If a passenger in an automobile knows, or by using reasonable care should know, of impending danger, if any, it is the duty of such passenger to use reasonable care to warn the driver of such danger, unless the passenger knows, or has reasonable cause to believe, that the driver already knows of the impending danger. Whether the passenger used reasonable care under all of the evidence, is a question of fact for the jury.

The court instructs the jury that the driver of an automobile is bound to keep a particularly continuous lookout while driving, but no such duty is imposed upon the passenger or guest. In the absence of knowledge of the passenger, or facts which would give

<sup>7</sup> Eddleman v Askew, 50 GaApp 474  
540, 179 SE 247

<sup>8</sup> McCoy v Kregel, 52 Idaho  
626, 17 P2d 547. See also French  
v Tebben, 53 Idaho 701, 27 P2d

<sup>9</sup> Ohlweiler v Central Engineer-  
ing Co., 348 IllApp 246, 109 NE2d  
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her such knowledge, a passenger or guest may properly rely on the driver to attend to the driving of the automobile. The primary duty of care for the safe operation rests upon the driver. However, a guest is not relieved from the exercise of such care for her own safety as is reasonable under all the circumstances <sup>10</sup>

#### Indiana

The mere fact, if you find it to be a fact from the evidence, that the plaintiff was a guest in the automobile of M, would not absolve the plaintiff from exercising the care of an ordinarily prudent person for her own safety <sup>11</sup>

#### Maryland

The court instructs the jury that if the jury find that the plaintiff was injured in consequence of the plaintiff's failure to act on the occasion of the accident as a person of ordinary care and prudence would have acted under the circumstances, and that such failure to use ordinary care and prudence directly contributed to the accident, the verdict must be for the defendant, the A. O. Co <sup>12</sup>

#### Michigan

A guest passenger riding with another driver is not required to regulate the speed of the car, to watch the road, or to watch for trouble ahead, but any danger that he sees, or any danger that an ordinarily careful and prudent person would see under the same circumstances, which he observes that the driver of the car does not see, or does not heed, it is his duty to warn the driver. It is summed up in one of the late cases that he would be guilty of contributory negligence if he, the guest passenger, fails to exercise any ability which he in fact has to control the conduct of the driver of the car. That depends upon the circumstances in every case, and you will have these rules in mind when you retire to your room <sup>13</sup>

#### Minnesota

Defendant claims that even if he was negligent, still, that plaintiff herself was negligent and that her negligence concurred in causing her injuries. The law required her to exercise rea-

<sup>10</sup> Nowak v Witt, 14 IllApp2d 482, 144 NE2d 813

<sup>11</sup> Cortez v Marland Ref. Co., Superior Court, Lake County, Indiana, No 551. See also Ohio Elec. Co. v Evans, 77 IndApp 669, 134 NE 519

<sup>12</sup> Cumberland & Westernport

Transit Co. v Metz, 158 Md 424, 149 A 4, 565

<sup>13</sup> Samuelson v Olson Transp. Co., 324 Mich 278, 36 NW2d 917, affirming judgment on verdict for guest passenger against owner of another truck

sonable care for her own safety, that is, such care as ordinarily prudent persons usually exercise under the same or similar circumstances. A failure on her part to exercise such care will defeat her right to recover. Her husband was driving the car at the time she was injured, at the time the collision took place. She naturally had a certain amount of trust in his judgment and relied to some extent upon his exercising due care to avoid accidents. She was entitled to put such reliance upon his judgment and upon his care, his method of driving the car, as ordinarily prudent persons acting under the same or similar circumstances would have put <sup>14</sup>

#### Missouri

Though the driver's negligence is not imputable to the passenger, the latter is not absolved from the necessity of taking reasonable precautions and using ordinary care for his own safety.

While the law requires a guest to exercise ordinary care and prudence for his own safety, and does not permit him to entrust his safety absolutely to the driver, regardless of impending danger or apparent lack of ordinary caution on the part of the driver, it does not require of him the same vigilance as is required of the driver <sup>15</sup>

#### Montana

The primary duty of caring for the safety of the vehicle and those riding in it rests upon the driver. A mere gratuitous passenger is not guilty of contributory negligence, as a matter of law, until he in some way actively participates in the negligence of the driver, or is aware of the incompetence or carelessness of the driver, or knowing that the driver is not taking proper precautions while approaching a place of danger, fails to warn or admonish the driver <sup>16</sup>

#### Oregon

(1) The law imposed upon the plaintiff as a passenger in her husband's automobile, the duty only of conducting herself as a reasonably prudent person riding with her husband would conduct herself in like circumstances, and if Mrs. N. in her conduct in this case acted as a reasonably prudent wife riding with her husband would have acted in like circumstances, then she could not be held guilty of negligence <sup>17</sup>

<sup>14</sup> Ward v. Bandel, 181 Minn 32, 231 NW 244

<sup>15</sup> Lewis v. Kansas City Public Service Co. (MoApp), 17 SW2d 359

<sup>16</sup> Marinkovich v. Tierney, 93

Mont 72, 17 P2d 93

<sup>17</sup> Noble v. Sears, 122 Or 162, 257 P 809. See also Burns v. Coast Auto Lines, 134 Or 180, 292 P 1038

(2) The plaintiff in this case was required to exercise reasonable care, that is, that degree of care which a person of reasonable prudence would exercise in the situation in which he was placed. If he had reason to suspect carelessness or incompetency on the part of the driver, it was his duty to protest and remonstrate with or caution him against being careless, or to caution him concerning the operation of the car, and if the driver was running the car at a dangerous rate of speed, and the plaintiff knew of the rate of speed and its danger, or, in the exercise of reasonable prudence, ought to have known and appreciated it, it was his duty to remonstrate against such speed, and direct the driver to slacken the same, and if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so.<sup>18</sup>

#### Washington

You are instructed that the law does not impose upon a guest or invitee of the operator of an automobile the duty to direct or supervise the driver of the automobile in the operation of the car, but does require that he use reasonable care for his own safety, and if you find from the evidence that the plaintiff in this case, at the time of the accident, was riding as a guest in C's car, and did all that a reasonably prudent person, in the exercise of ordinary care, would do, under the circumstances in which he was situated, to protect himself, or to avoid the collision and injuries so received by him, if you find he was injured, then he would not be guilty of contributory negligence that would bar or prevent a recovery of damages from the defendant.<sup>19</sup>

#### § 400. — Competency of operator generally.

#### Mississippi

The court instructs the jury that if you believe from the preponderance of the evidence that R. H. did, on the occasion of this accident and other times on this trip before the accident, so negligently operate his automobile as to put F. H., deceased, on notice that he, R. H., was a dangerous driver, and that it was dangerous to ride further with him, and that F. H., deceased, continued to ride with R. H., and that his injury and death was caused in whole or in part as a proximate result of R. H.'s negligence, then the plaintiff cannot recover anything, and it would be your sworn duty to find for the defendant.

The court charges the jury that the burden is upon defendant to show by a preponderance of the evidence that R. H. was

<sup>18</sup> Elling v. Blake-McFall Co., 85 Or 91, 166 P 57

<sup>19</sup> Newman v. Cogshall, 171 Wash 609, 18 P2d 850

such a reckless driver as to put deceased on notice that it was dangerous to ride with him <sup>20</sup>

#### Utah

One in the status of a guest or invitee, notwithstanding the negligence, if any, of the driver, be not imputed to him, may himself be guilty of negligence in failing to exercise ordinary care for his own safety. A guest is required to exercise the same care for his own safety that a reasonable and prudent person would exercise under the same circumstances. Where one rides with an intoxicated driver, or one who has defective eyesight, or one who drives at an excessive or unlawful rate of speed, and the guest, with knowledge of such condition of the driver or such negligent or unlawful acts without objection, continues to ride in such automobile, and an accident happens which is caused or contributed to by such negligence, cannot recover <sup>21</sup>

#### § 401. — Intoxication of operator.

#### Connecticut

If the driver of a car, from intoxication, is in a condition which renders him incapable of operating it with proper diligence and skill, and this is known or palpably apparent to one entering the car, that is a fact to be taken into consideration along with the other facts in the case in determining whether such person exercised ordinary or reasonable care in entering or remaining therein. If an ordinarily reasonable and prudent person would not have entered an automobile driven by a person known to be intoxicated, or whose intoxicated condition is palpably apparent, it would be negligent for one to so enter the automobile and ride therein, and, if injury resulted from the failure of the driver to operate the car with proper care and skill because of his intoxicated condition, then the person riding therein could not recover under those conditions. A guest or a gratuitous passenger, however, is not negligent in riding with an intoxicated driver or one under the influence of intoxicating liquors, if he was unaware of such intoxication, and no facts had been noticed by him which would arouse the suspicions of one of ordinary prudence in relation thereto. Also, if you find that the defendant was intoxicated or under the influence of liquor, you will determine whether that fact was known to the plaintiffs or any one of them, or that his intoxicated condition was so palpably apparent that it must have been

<sup>20</sup> Haynes-Walker Lbr Co v  
Hankins, 141 Miss 55, 105 S 858

<sup>21</sup> Balle v Smith, 81 Utah 179, 17  
P2d 224

known to them and liable to affect his operation of the car. You will then determine whether they or any one of them was negligent in entering the car, or acted as a reasonably prudent person while in the car, without doing more than you may find they or any one of them did to have the defendant run the car in a more reasonable or proper manner <sup>22</sup>

#### Georgia

If the plaintiff rode in the automobile when he knew, or in the exercise of ordinary care could have known, that the driver was under the influence of intoxicating liquor and was incompetent to drive, and the plaintiff in this respect failed to exercise ordinary care for his own safety, and his failure to do so was the direct and proximate cause of his injuries, he cannot recover. <sup>23</sup>

#### Idaho

Should the jury believe from the evidence that the driver of the car, D T, was intoxicated at the time of the accident, and that for that reason she operated the car in a negligent manner, and should you further believe from the evidence that the plaintiff, S K F, knew that the said D T was intoxicated at said time, then it was the duty of the said S K F to exercise ordinary care for her own welfare, that is, she was required to act as an ordinarily prudent person would have acted to protect herself against the negligence of the defendant, D T, and to adopt any efficient means at her command to prevent being injured, and should the jury believe that the plaintiff, S K F, protested, that is, asked the defendant D T not to drive so fast, but should the jury further believe that such protest was not an efficient means of preventing the accident, and the said S K F could have prevented injury to herself by the exercise of ordinary care, then the protest will not excuse the plaintiff in this case <sup>24</sup>

#### Washington

The ultimate test you should apply in determining whether the plaintiff, O W, was guilty of independent negligence in riding with the defendant, G G, is whether in so doing he acted as an ordinarily careful and prudent person would have acted under the circumstances. Whether the driver evidenced recklessness in his driving from use of intoxicants or otherwise or at all, if so, whether this was apparent or should have been apparent to the passenger, whether the facts required that the passenger protest, whether he did protest and if so, adequately;

<sup>22</sup> Fitzpatrick v Cmtis, 107 49 GaApp 755, 176 SE 846  
Conn 91, 139 A 639 <sup>24</sup> French v Tebben, 53 Idaho  
<sup>23</sup> Smeltzer v Atlanta Coach Co, 701, 27 P2d 474

whether the passenger should have continued riding, whether he could have or should have gotten out; these are all matters which you may consider, along with the other facts of the case, in determining whether the passenger exercised ordinary care in entering the car or remaining in it, or in reference to his conduct while in it. If, under all of the facts, you find that the passenger failed to exercise that care which an ordinarily careful and prudent person would have exercised under the circumstances, and such failure caused or contributed in causing an injury to himself, he cannot recover therefor; but if you find that he did act as an ordinarily careful and prudent person similarly situated would have acted, then there is nothing in his own conduct which would bar his recovery. <sup>25</sup>

**§ 402. — Intoxication of passenger.**

If the plaintiff and other occupants of the car were intoxicated and by reason of intoxication failed to exercise ordinary care, and this lack of care caused or contributed to the accident, the plaintiff cannot recover. <sup>26</sup>

**§ 403. — Crowding of passengers.**

I will say to you as a matter of law that the violation of a duly enacted and existing ordinance of a city constitutes irrebuttable negligence in itself. The undisputed evidence in this case is that six persons were riding in the automobile which was involved in this accident, and that said automobile was a single-seated car and all of said persons were in said front seat.

I will say to you that this constituted a violation of said ordinance and that the decedent, R. M., as one of said passengers, was guilty of negligence.

If you find that said negligence in the slightest degree contributed directly to the accident which resulted in her death, then her administrator cannot recover in this case and your verdict must be for the defendant. <sup>27</sup>

**§ 404. — Riding on outside of vehicle.**

**Alabama**

No horizontal rule or rule of plumb or inflexible rule can be predicated about negligence, but a man riding upon a running board, as I have stated, depends altogether upon the circum-

<sup>25</sup> *Wold v Gardner*, 167 Wash Terrell, 149 Va 344, 141 SE 231  
191, 8 P2d 975 <sup>27</sup> *Pennsylvania R Co v Moses*,

<sup>26</sup> *Seaboard Air Line R Co v* 42 OhApp 220, 182 NE 40

stances under which he did ride upon the running board, how fast the car was moving, and those circumstances which shed light upon the thing. In other words, it still becomes a jury question whether, under the particular circumstances, the person demeans himself as a reasonably prudent person of his years would have done.<sup>28</sup>

#### Connecticut

To ride on the running board of a moving automobile is necessarily attended with greater danger than to ride inside the body of the car, and when one chooses to do so, he must exercise a greater degree of care and diligence than when riding inside the car as the greater the danger, the greater the care that must be exercised.<sup>29</sup>

#### § 405. — Passenger holding leg outside vehicle.

A passenger in a car riding in a populous city with one leg protruding from one of the doors of a car in such a way as to make it liable to come in contact with passing objects is negligent in conduct.<sup>30</sup>

#### § 406. — Passenger in bus.

The jury are instructed that if they find from the evidence that on or about December —, 19—, the plaintiff was a passenger in the bus of the defendant, the C & W. T. Co., and that while she was such passenger, the plaintiff was injured by reason of a collision between said bus and a truck, which was operated by the defendant, the A O Co., its servant or agent, on a public road between Frostburg and Lonaconing, in Allegany County, Maryland, if the jury so find, and that the plaintiff's injury resulted directly from the want of ordinary care and prudence on the part of the defendant, the A O Co., its servant or agent, and not from the want of ordinary care and prudence on the part of the plaintiff directly contributing to the accident, then the plaintiff is entitled to recover as against the defendant, the A. O. Co.<sup>31</sup>

#### § 407. — Lights on vehicle in which passenger is riding.

##### Minnesota

If the jury should find from the evidence that plaintiff was in a position to see the way in which the F. car was lighted as

<sup>28</sup> *Brasfield v Hood*, 221 Ala 240, 128 S 433

<sup>29</sup> *Salemme v Mulloy*, 99 Conn 474, 121 A 870

<sup>30</sup> *Salemme v Mulloy*, 99 Conn 474, 121 A 870

<sup>31</sup> *Cumberland & Westernport Transit Co v Metz*, 158 Md 424, 149

to front lamps, and if the jury from all circumstances believe that she did know that said automobile was being operated with only one of the front lamps thereon lighted, then the jury should find as a matter of law, under all the circumstances, that plaintiff knew the law was being violated, and, if she voluntarily continued as a passenger therein, then she would be guilty of negligence <sup>32</sup>

#### South Dakota

However, the mere failure of such car to have two lights, would not in any way defeat her rights in this case, unless her injuries were due in some degree to her own personal negligence. Her rights would not be defeated solely on account of any negligence there might be on the part of her husband, nor unless the failure to have two lights on the car contributed to and helped to cause her injuries <sup>33</sup>

#### § 408. — Passenger's use of faculties to discover dangers and to warn operator.

#### Delaware

In the present case, the deceased was a guest or passenger in the automobile owned and operated by C, and it has been held in this state that when the person injured or killed is merely a passenger in a vehicle and has no control over the operator, the negligence of the operator, if any, cannot be imputed to the passenger so as to defeat the latter's right of recovery against a third person for injuries resulting from the concurrent negligence of such operator and third person. In such case, however, the passenger is required to exercise due care and caution as well as the driver. However, the passenger is not held to the care that is required of the operator. The passenger has the right to rely, to a great extent on the prudence, care, and skilfulness of the operator. This is necessarily so, and the reason is obvious. The passenger is not the owner, and ordinarily is not responsible for its operation. But a passenger is not absolved from all care in every case. Whether he exercised the care required of a passenger depends on the facts of the particular case, and, particularly, his position in the automobile, his opportunity of seeing the impending accident, and the obviousness of the danger. If the passenger sees the danger in time to avoid the accident, it is his duty to warn the operator. Or, if the passenger is in such position in the car that he must have seen the danger if he had used his sense of

A 4, reargden 158 Md 424, 149 A 1, 187 NW 705

565

<sup>33</sup> Pemberton v Fritts, 56 SD

<sup>32</sup> Judkins v. Sprague, 152 Minn 374, 228 NW 409



sight, as an ordinarily prudent passenger in such position would have done, and the accident happens because of the passenger's failure to see and warn the operator of the danger he must have seen, he would be guilty of contributory negligence. But we instruct you that a passenger is not required to do anything more than an ordinarily prudent person in a similar position and relation, who is not the operator, would have done in a like situation.<sup>34</sup>

#### Indiana

The plaintiff is chargeable with knowledge of the fact that on the public highway over which he was riding there might be other vehicles than the one in which he was riding and knowing this to be the case, it was his duty to look for other vehicles and on seeing them, notify the driver of the car in which he was riding of their presence. If therefore, he could have seen the truck in question by looking and failed to do so, and by reason thereof failed to warn the driver of his car of the close presence of said truck in time to have changed the course of the said car and avoided the collision, he was guilty of contributory negligence and cannot recover. But you must determine from all the evidence whether plaintiff could have, under the exercise of reasonable care, discovered the truck in time to have avoided said collision.<sup>35</sup>

#### Minnesota

If she appreciated or should have appreciated the dangers and risks of riding in such a conveyance on this road, on this Sunday evening, and voluntarily continued to remain in the car without protest and without doing anything to caution or warn the driver, then she was negligent as a passenger, and if her negligence helped to bring about this accident, then she cannot recover even though S. also was negligent.<sup>36</sup>

#### Missouri

Plaintiffs' daughter could not rely absolutely upon the driver to drive the automobile safely. It was her duty to use ordinary care to observe the road and the manner of driving. If you find from the evidence that she permitted herself to be driven at a rapid rate of speed, up to and around the curve in the road, when in the exercise of ordinary care she should have observed said curve and warned the driver of the car, and such failure, if any,

<sup>34</sup> Poynter v Townsend, 3 W W Harr (33 Del) 51, 130 A 678

<sup>35</sup> Indianapolis Glove Co v Fenton, Superior Court, Marion County,

Indiana, No 39625, see 89 Ind App 173, 166 NE 12

<sup>36</sup> Judkins v Sprague, 152 Minn 1, 187 NW 705

directly contributed to cause her injuries, then plaintiffs cannot recover <sup>37</sup>

#### North Dakota

In determining your answer to question 10 in the case of D T Co , I charge you that with reference to the deceased, M. G , there is no evidence in this case that she was engaged in operating the automobile in question with A E C , as a joint adventure or enterprise, and that her situation was that merely of a passenger and guest. The care required of her was the care which would be exercised by an ordinarily prudent person riding as a passenger under such circumstances. A passenger in a vehicle is not held to the same degree of watchfulness as the driver. The primary duty of caring for the safety of the vehicle and passengers rests upon the driver, and, unless the danger is obvious or is known to the passenger, the latter may rely upon the assumption that the driver will exercise proper care and caution in approaching a place of danger, unless he or she knows the driver to be incompetent or has reason to believe that he is not performing his duty by looking for trains, and such facts are proved by the evidence. A passenger is not necessarily guilty of contributory negligence if he or she fails to look and listen. The test is as to what a reasonably prudent person should have done under the circumstances, taking into consideration her knowledge of the skill and experience of the driver, and all the other surrounding facts and circumstances of the case. You may also take into consideration in determining your answer to this question whether or not if the deceased, M. C , had attempted to look and listen for an approaching train with the view of herself helping to anticipate or discover any possible danger, and thereby, for the time being, exercised no control over the minor children in the car, she would or would not have increased rather than diminished the danger by the possibility of diverting the attention of the driver, A E C , from the control and operation of the car, and from his diligence and care in controlling and operating his automobile as he approached the railway crossing <sup>38</sup>

#### Ohio

I charge you that if you find from the evidence, that plaintiff was seated beside the driver, with apparently equal opportunity to observe impending dangers, and within easy access so as to readily communicate to the driver the result of her observations, she was required to exercise ordinary care for her own safety,

<sup>37</sup> Carlton v Stanek, 225 MoApp 646, 38 SW2d 505

<sup>38</sup> Amenla & Sharon Land Co v

Minneapolis, St P & S S M R Co, 48 ND 1306, 189 NW 343

and was required to so use her faculties of sight and hearing to discover dangers incident to such bridge and apprise the driver thereof as would a person of reasonable and ordinary prudence under the same or similar circumstances <sup>39</sup>

#### Pennsylvania

(1) Also bear in mind that the law does not look with favor on back seat drivers. If you are riding in an automobile and you undertake to help the driver to operate that automobile, nine times out of ten you will do more harm than good, you know that, and you know if you are going to say, "Did you see that light? Look out for that car," you're going to make him nervous. There is no duty on your part to do that. But it might be that you would think that he saw these cars coming together at such a distance that it was his duty to do something about it. If you do think so and he did not do something, then he was guilty of contributory negligence and he cannot recover. <sup>40</sup>

(2) It is the duty of a passenger, no matter where he may be seated, if he knows of danger immediately ahead to warn the driver and to call his attention to the danger and to ask him to stop. If he does not do so, he himself is guilty of negligence. <sup>41</sup>

#### Utah

If a guest sees or discovers the danger in time to warn the operator of the car or the danger is so obvious, or he is in such position that he must have seen it in the exercise of due care, and an accident happens because of his failure to warn the operator of such danger, he may be guilty of negligence which will prevent a recovery. <sup>42</sup>

#### Washington

You are instructed that every person is charged with the duty to exercise reasonable care for his own protection and this rule applies as well to one riding in an automobile driven by another. So it is the duty of one riding with another, if such one knows, or in the exercise of reasonable care should know, of an approaching danger and at such time as that one could reasonably warn the driver of such approaching danger, to warn the driver thereof. However, if the situation arises so unexpectedly that the discovery of the danger and the accident itself

<sup>39</sup> Springfield v. McDaniel, 45 OhApp 87, 186 NE 741. See also Hughes v. Hanselman, 44 OhApp 516, 185 NE 852.

<sup>40</sup> Winters v. York Motor Exp Co., Inc., 116 PaSuperCt 421, 176

A 812

<sup>41</sup> Beck v. United States Railroad Administration, 268 Pa 571, 112 A 34.

<sup>42</sup> Balle v. Smith, 81 Utah 179, 17 P2d 224.

were necessarily almost instantaneous and simultaneous, then the one riding with another can not be charged with the duty of warning against such danger. If, therefore, you find by a fair preponderance of the evidence that the plaintiff was negligent in that she failed to do that which an ordinarily careful and prudent person would have done to protect herself under the circumstances as you find them to have existed, and that such negligence on her part was the proximate cause of her injuries, if any, then the plaintiff is not entitled to recover in this action.<sup>43</sup>

Wisconsin

(1) The fifth question is this

At the time in question was the plaintiff, L. H. B., negligent in respect to care for his own safety?

The seventh question is this

At the time in question was the plaintiff, M. B., negligent in respect to care for her own safety?

The plaintiffs, L. H. B. and M. B., were each a guest in the B automobile and they were not in charge of operating the car.

But the fact that they were guests only and had no control of the car did not relieve them from all duty to use care for his or her own safety. Each was required to keep such reasonably careful outlook for dangers and to give such warning to the driver as an ordinarily prudent guest would usually do under the same or similar circumstances, or to take such other care for his or her own safety as then and there was reasonably required.

In case either of these two plaintiffs failed to use and take for his or her own safety such care and caution as an ordinarily prudent guest in an automobile would ordinarily use and take under the same or similar circumstances, then he or she was negligent, otherwise not.<sup>44</sup>

(2) The fifth question is this:

Was the plaintiff S. L. negligent in respect to keeping a sufficient lookout for her own safety?

It was the duty of the plaintiff, S. L., to use reasonable care for her own safety and she was not relieved from that duty

<sup>43</sup> Colvin v. Simonson, 170 Wash. Court, Marathon County, Wisconsin, 341, 16 P2d 839, see 210 Wis 345, 352, 354, 244 NW

<sup>44</sup> Brown v. Haertel, Circuit 630, 633, 246 NW 691

merely because she was riding as a guest in her son's car which he alone was operating. By merely inviting her to be his guest, he did not thereby guarantee her safety. It was her duty to take due precautions for her own safety.

It is for the jury to say whether she was negligent in not taking more or greater precautions or measures for her own safety in view of the speed of the car and the conditions of the road and other circumstances surrounding the operations of the car.

She was negligent if, under the circumstances, she so acted or so omitted to take precautions for her own safety that she ought reasonably to have foreseen that some injury or damage to herself might probably result from her own conduct in so continuing in the car, or in other words, if she failed to take all such precautions for her own safety as an ordinarily prudent guest in an automobile would ordinarily take under like circumstances.

It was her duty to observe how the car was being operated and in case by giving reasonable attention she observed, or ought to have observed, that her son A. was doing, or about to do some act that endangered her safety, it was her duty to remonstrate and try to correct or prevent any such dangerous conduct. If she failed to do so, she may be found to have been negligent.

The sixth question is this:

If you answer "Yes" to the fifth question then answer this:

Did such negligence on the part of S. L. substantially contribute to produce her injury?

Here again we have the question of cause and effect.

If you find that Mrs. L. was negligent for her own safety, then you are here to decide whether that negligence substantially contributed to produce her injury received at the time of the collision.<sup>45</sup>

#### § 409. — Passenger asleep.

##### Alabama

If a reasonably prudent man riding in the automobile at the time and under the circumstances and conditions would not have suffered himself to fall asleep and plaintiff was asleep at

<sup>45</sup> *Lapsenberg v. Snapp*, Circuit Court, Lincoln County, Wisconsin, see 205 Wis. 681, 238 N.W. 289.

the time of the accident and that condition proximately contributed to his injuries, your verdict should be for the defendant <sup>46</sup>

#### Missouri

The court instructs the jury that it was the duty of plaintiff while riding in defendant's automobile to exercise ordinary care for her own safety, and in that regard you are further instructed, that if you find and believe from the evidence that at the time of the collision mentioned in the evidence, plaintiff had voluntarily placed herself on the front seat of defendant's automobile with her head and the left side of her body so close to the right shoulder and arm of the defendant driver so as to interfere with the ability of the defendant driver to turn said automobile quickly and sufficiently to the left, if you so find, after the automobile had swerved to the right, if you find it did, and if you further find that in so seating herself plaintiff failed to exercise ordinary care for her own safety and was thereby negligent, and such negligence, if any, directly caused or contributed to cause the collision in question, if you so find, and plaintiff to be injured; then you are instructed plaintiff is not entitled to recover in this case and your verdict must be for defendant, and this is true even though you may find and believe that defendant was also negligent as defined in other instructions. <sup>47</sup>

#### Ohio

The claim of defendant is that plaintiff was guilty of contributory negligence by going to sleep on the back seat of the automobile \* \* \*. The court says to you that it is not negligence in and of itself for a guest in an automobile to go to sleep. It depends upon the circumstances of each particular case. You are to take this claim of contributory negligence in the light of all the circumstances of this case and see whether the plaintiff exercised ordinary care for her own safety. As such guest, if nothing had occurred to indicate to her that the defendant was an unsafe driver or was likely to go to sleep, she had the right to assume that he would drive the automobile safely. If she saw anything or knew anything that would indicate to her that it would be unsafe to trust her safety to the defendant as a driver, then it *might* be negligence for her to go to sleep. The law leaves these matters to you for your determination, with the burden being on the defendant to prove by a preponderance of the evidence, his claim of contributory negligence <sup>48</sup>

<sup>46</sup> McDermott v Sibert, 218 Ala SW2d 151  
670, 119 S 681

<sup>48</sup> Collins v McClure, 143 OhSt

<sup>47</sup> La Fata v Busalaki (Mo), 291 569, 56 NE2d 171

§ 410. — When operator is driving at excessive speed or is driving negligently or recklessly.

California.

(1) I further instruct you that a passenger in an automobile operated by another not for hire is required to use ordinary care for his own safety. If he is aware that the operator is carelessly operating the automobile, or is carelessly rushing into danger, it is incumbent upon him to take such steps as an ordinarily prudent person would take under the same circumstances for his own safety.

I therefore instruct you that, if you find from the evidence that said D. M. C. while a passenger in the automobile in which he met his death, by the exercise of ordinary care could have avoided the injuries which he received, then your verdict should be for the defendants.<sup>49</sup>

(2) The duty of a passenger to remonstrate against excessive speed or to withdraw from the vehicle, a reasonable opportunity therefor being afforded, is not absolute; the question whether by failing to do so he is wanting in ordinary care being dependent upon the circumstances of the particular case.<sup>50</sup>

Indiana

(1) A passenger in an automobile operated by another, not for hire, is required to use ordinary care for his own safety. If he is aware that the operator is carelessly operating the automobile, or is carelessly rushing into danger, it is incumbent upon him to take such steps as an ordinarily prudent person would take under the same circumstances for his own safety.

It is the duty of a guest while riding in the automobile of another to exercise ordinary care for his own safety. And if such guest in the exercise of ordinary care observes that the driver of the car is traveling at an excessive rate of speed, or is not obeying the law of the road, or traffic regulations, or observes any impending danger, then it is the duty of such guest to warn and caution, or attempt to persuade the driver of said

Where the word "might" appears in italics in the instruction given here, the court used the word "would." Since there was a judgment in favor of the plaintiff, a guest, in the case cited, no objection was made to the instruction that it would be negligence for the guest to go to sleep, under

certain circumstances. It is doubtful if the guest would be guilty of negligence per se. It would be safer to leave that question for the determination of the jury.

<sup>49</sup> *Curran v. Eaile C. Anthony, Inc.*, 77 CalApp 462, 247 P 236.

<sup>50</sup> *Querolo v. Pacific Gas & Elec. Co.*, 114 CalApp 610, 300 P 487.

car from said negligent conduct, if a reasonably prudent person in the exercise of ordinary care would have done so under the same or similar circumstances <sup>51</sup>

(2) A guest riding in an automobile wherein the driver has suddenly and without warning committed a negligent act, cannot be said to be guilty of contributory negligence merely because said guest sat still in the automobile until the collision occurred or did not insist or demand that the automobile be stopped or that he or she be allowed to get out. If you find from the evidence that the negligent act of the driver of the car in which such guest was riding took place so close to the point of collision that there was insufficient time for such guest to take further steps to secure her safety if it was incumbent upon her to do so in order to escape, she cannot be charged with negligence merely on account of remaining quiet in the automobile at the time of, or immediately after such negligent act <sup>52</sup>

#### Kansas

(1) An invited guest, riding in an automobile driven at an excessive and dangerous speed, is required to exercise such care as is reasonable and practical to avoid injury to himself, and if he fails to warn the driver, remonstrate with him, or demand that the automobile be stopped so that he may leave it or take any precaution for his own protection, when there is time and opportunity to do so, no recovery can be had for injury sustained by him through the negligent operation of the car

You are instructed that if you find from the evidence that R S was a young man 20 years old, in the possession of all his faculties, and that at the time of the accident complained of, he was riding in an automobile driven by the defendant at a dangerously high rate of speed, and that he had been riding in said automobile for a sufficient distance prior to the accident for him to become aware that said automobile was being driven at a high and dangerous rate of speed, and if you further find that R S made no protest to the defendant against the high rate of speed of the automobile, and did not request the defendant to stop or slow down the car, then I instruct you that R. S. was guilty of contributory negligence, and the plaintiffs cannot recover in this action <sup>53</sup>

(2) Where one person is riding with another for the mutual pleasure or convenience of both, and such person discovers that

<sup>51</sup> Setzer v Alger, Superior Court, 23520  
Lake County, Indiana, No 1254

<sup>52</sup> Kettles v Sofianos, Superior  
Court, Lake County, Indiana, No

<sup>53</sup> Sharp v Sproat, 111 Kan 735,  
208 P 613, 26 ALR 1421



the driver is running his automobile recklessly, or in a manner that would indicate injury and damage, it becomes his or her duty, if he or she has the opportunity to insist that the driver shall desist or stop the automobile and allow him or her to alight, or to take some suitable steps for his or her own protection, and if, on the other hand, under such circumstances, such a person sits by without protest and permits himself or herself to be driven on to his or her injury, this will be such negligence as will bar a recovery by either party <sup>54</sup>

#### Kentucky

If the jury believe from the evidence that, when the plaintiff, K E, got into and rode in the automobile of the defendant C B M, on the occasion complained of in the evidence, she, the plaintiff, knew or had reasonable grounds to believe that the defendant C B M would drive said car at an excessive and dangerous rate of speed, and that thereafter said C B M. did drive said car at an excessive and dangerous rate of speed. by reason whereof said defendant did cause said automobile to overturn and injure the plaintiff, or if the jury believe from the evidence that the plaintiff, even though she had no knowledge or reasonable grounds to believe, at the time she got into said automobile, that the defendant would drive said automobile at an excessive or dangerous rate of speed, yet nevertheless, after she got into said automobile, discovered that said C. B M was driving her automobile at an excessive and dangerous rate of speed, and had the opportunity to insist that said C B M desist operating said automobile at such a dangerous and excessive rate of speed, or to insist that said C B M stop said automobile and allow plaintiff to alight, and she failed to do so, and sat by without protest, and permitted herself to be driven at an excessive and dangerous rate of speed, and that by reason of such excessive and dangerous rate of speed the defendant did cause said automobile to overturn and injure plaintiff, then the plaintiff was guilty of contributory negligence, and the law is for the defendants, and the jury should so find <sup>55</sup>

#### North Carolina

I further instruct you that the law recognizes that contributory negligence may be due either to acts of omission or acts of commission, in other words, lack of diligence or want of due care on the part of the plaintiff may consist of doing the wrong thing at the time and place in question, or may consist of doing

<sup>54</sup> Dent v Jefferson County Comrs, 118 Kan 519, 235 P 873

<sup>55</sup> New York Indemnity Co v Ewen, 221 Ky 114, 298 SW 182

nothing when something should be done. The test is: Did the plaintiff exercise that degree of care which the ordinarily prudent man would exercise under similar circumstances, and was his failure to do so the proximate cause of his injury? Defendant P contends that plaintiff's failure to exercise proper care was the cause of his injury and defendant P further contends that it was an act or omission on plaintiff's part that caused his injury, that he failed to do something that he should have done, that by his own testimony he told the jury Mr. P. was operating the car recklessly, at a high and excessive rate of speed, and that he failed to have defendant P stop the car and get out, and that by this act of omission, plaintiff was negligent and that you should so find. Plaintiff contends that he remonstrated as best he could and that he was not the owner of the car and that he did the best he could. If the defendant P has satisfied you by the greater weight of the evidence that plaintiff was negligent, and that his negligence was the proximate cause of the injury it would be your duty to answer the second issue "Yes," but if you do not so find, and if upon weighing and considering all the evidence you find it equally balanced, you will answer it "No." <sup>56</sup>

#### Oregon

The plaintiff in this case was required to exercise reasonable care, that is, that degree of care which a person of reasonable prudence would exercise in the situation in which he was placed. If he had reason to suspect carelessness or incompetency on the part of the driver, it was his duty to protest and remonstrate with or caution him against being careless, or to caution him concerning the operation of the car, and if the driver was running the car at a dangerous rate of speed, and the plaintiff knew of the rate of speed and its danger, or, in the exercise of reasonable prudence, ought to have known and appreciated it, it was his duty to remonstrate against such speed, and direct the driver to slacken the same, and if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so. <sup>57</sup>

#### Washington

You are instructed that a guest riding in an automobile is not permitted to "sit tight" and pay no attention whatever to the conduct of the driver, but must exercise reasonable care for her own safety, and if she sees, or in the exercise of reasonable care should see, that the driver is operating the car in a negligent or dangerous manner, or in any manner to violate

<sup>56</sup> King v Pope, 202 NC 554, 163 SE 447. See also Alexander v Southern Public Utilities Co., 207

NC 438, 177 SE 427.

<sup>57</sup> Elling v Blake-McFall Co., 85 Or 91, 166 P 57.

the law, and if the circumstances are such that, as a reasonably prudent person, she should protest or warn the driver against such conduct but fails to do so, then she herself is guilty of negligence, and if such negligence contributes as a proximate cause to her injury, she cannot recover.

To restate the matter in another form, the law does not impose upon a guest an absolute duty to direct or supervise her host in the operation of the car, but does require that she exercise reasonable care for her own safety, and if the circumstances are such that a reasonably prudent woman in her position would warn or caution the driver about the operation of the car, then she must do so or she is guilty of negligence.<sup>58</sup>

#### Wisconsin

(1) It is the duty of the guest to timely protest to the driver if such driver is driving in such a manner as to increase the danger to or add a new one to the risks assumed by the guest upon entering the car of the driver, and if the guest fails to protest, he will be held to have acquiesced in such course of driving, if it has persisted long enough to give him an opportunity to protest; however, if the act of the driver increasing the danger or adding a new one is done so quickly or in such a manner that the guest had not sufficient time to make an efficient protest, he is then not required to make a protest which would be entirely useless, and under such circumstances, the guest cannot be held to have acquiesced in or consented to such faulty driving.<sup>59</sup>

(2) You are further instructed as follows: There is evidence in this case that J K fell asleep momentarily just before the accident occurred. You are instructed that if the plaintiff, E E K, knew or ought to have known that J. K. worked until late the night before the accident and had had very little sleep before the trip in question began, then plaintiff assumed the risk of injury from any accident caused by the driver falling asleep at the wheel. It is for you to say from the evidence whether or not the plaintiff knew of the situation.<sup>60</sup>

#### § 411. — Passenger's negligence as proximate cause; injury avoidable by operator of other vehicle; comparative negligence.

##### California.

Even if you should find that the defendants were negligent, yet, if you also find that the plaintiffs were negligent, or that

<sup>58</sup> Graves v Mickel, 176 Wash 349, 289 NW 822  
329, 29 P2d 405

<sup>60</sup> Krantz v Krantz, 211 Wis 249,

<sup>59</sup> Helgestad v North, 233 Wis 248 NW 155

the plaintiff Mr C alone was negligent, and that such negligence, if any, on the part of plaintiffs, or on the part of the plaintiff, Mr C, proximately contributed in any degree, however slight, to the happening of the accident and injuries, then, in such event, neither of the plaintiffs can recover, and your verdict should be in favor of the defendants <sup>61</sup>

#### Indiana

If you find from the evidence that there was an ordinance adopted by the city of East Chicago, and certain action taken by the park board of the city of East Chicago requiring all vehicles before entering upon or crossing a boulevard in such city to come to a complete stop, and that the driver of the automobile in question before entering upon Grapevine Boulevard violated such ordinance by not stopping before entering upon such boulevard, the violation of such ordinance was not in itself contributory negligence upon the part of plaintiff's decedent, unless you believe from the evidence that such failure to stop contributed directly toward the accident alleged in the complaint, and that also such failure to stop was through the carelessness and negligence of plaintiff's decedent <sup>62</sup>

#### Maryland

The jury are instructed that if they find from the evidence that the plaintiff was a passenger in the bus of the defendant, the C. & W T Co, and that she suffered the injuries mentioned in the evidence by reason of a collision between the bus in which she was riding and the truck of the defendant, the A O Co, and if the jury further find that the collision was due both to the negligence of the defendant, the C & W T Co, its servants or agents, and to the negligence of the defendant, the A O. Co, its servants or agents, then the verdict of the jury must be for the plaintiff as against both defendants, unless they shall find the injury complained of resulted from the want of ordinary care and prudence on the part of the plaintiff, directly contributing to the accident <sup>63</sup>

#### Ohio

If you find that the plaintiff was guilty of negligence in the slightest degree, directly contributing to said accident, then she cannot recover, and your verdict must be for the defendants. <sup>64</sup>

<sup>61</sup> Cummins v Yellow & Checkel Cab Co, 127 CalApp 170, 15 P2d 536

<sup>62</sup> Friedman v Wolf, Superior Court, Lake County, Indiana, No 22640

<sup>63</sup> Cumberland & Westernport Transit Co v Metz, 158 Md 424, 149 A 4, rearg den 158 Md 424, 149 A 565

<sup>64</sup> Rogers v Ziegler, 21 OhApp 186, 152 NE 781

**Wisconsin**

The fifteenth question is this

If you find the plaintiff, L. H. B., was negligent in respect to his own safety, then answer this question: What proportion of all of the negligence of all of the persons which produced L. H. B.'s injuries is attributable to him?

This plaintiff was a guest and not an operator of any car. He received injuries as the result of the collision

In case you find that he was negligent in respect to his own safety, you are here to find what proportion of all the negligence of all the persons who contributed thereby to produce the injuries is attributable to the plaintiff

You will notice that this relates to the injuries of the plaintiff. It does not relate to producing the collision, but does relate to producing the injuries

Now if a plaintiff was negligent for his or her own safety, and they thereby contributed to produce his or her own injuries, you are to find here what proportion of all of the negligence which contributed to produce those injuries is attributable to that particular plaintiff

It cannot be said that a guest in an automobile by negligence on his or her part contributed to produce the collision, but it may be said that such negligence on his or her part contributed to produce his or her injuries

The negligence of all persons which cooperated to produce the injuries to a particular person, including the negligence of the plaintiff himself or herself, if any, should be taken as 100 per cent, and then you are to determine from the evidence what proportion of all of that negligence is attributable to the particular plaintiff in question <sup>65</sup>

**§ 412. — Contributory and imputed negligence of children passengers.**

**Georgia**

A child guest 13 years of age is not, as a matter of law, incapable of negligence on account of its age, but such child is not bound to exercise the same measure of ordinary care which is exacted of every prudent adult; such child is nevertheless required to exercise the "due care" of a child of "tender

<sup>65</sup> Brown v Haertel, Circuit Court, Marathon County, Wisconsin, see 210 Wis 345, 352, 354, 244 NW 630, 633, 246 NW 691

years," which is "such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation" <sup>66</sup>

**Kentucky.**

The jury should find for the plaintiff [six-year-old child], unless they should believe from the evidence that her injuries were caused solely by the negligence of the driver of the car in which she was riding at the time of the accident. <sup>67</sup>

**§ 413. Contributory and imputed negligence of absent owner in action for damage to his vehicle.**

**Georgia**

If you find from the evidence that the motorcycle was taken by its deceased driver without the consent or knowledge of the plaintiff owner, any negligence of the driver would not be chargeable to the plaintiff <sup>68</sup>

**Indiana**

(1) If you find that the driver of the plaintiff's automobile was operating the same at the time of the accident with the knowledge and consent of said plaintiff and was at that time a member of the plaintiff's family and was at said time conveying the wife and child of said plaintiff in said automobile with the knowledge and consent of said plaintiff; and if you further find that the driver of the said automobile was negligent in any manner in the operation of the same, which contributed to the damage of the same as set out in the plaintiff's complaint, then under such circumstances the negligence of such driver will be imputed to said plaintiff and will bar a recovery by said plaintiff in this cause. <sup>69</sup>

(2) If you find from the evidence in this case that the plaintiff at the time and place alleged had entrusted plaintiff's automobile to his daughter, and if you find that the daughter was operating such automobile because of her family relationship to the plaintiff at his request or with the knowledge, consent and permission of the plaintiff; and if you find that the plaintiff had full knowledge of the trip on which such automobile was being used, then any negligence of the driver in such lawful use became and was imputed to the plaintiff himself, and if

<sup>66</sup> Eddleman v Askew, 50 Ga App 540, 179 SE 247

<sup>67</sup> Big Sandy Bus Line Co v Williams, 246 Ky 758, 56 SW2d 346.

<sup>68</sup> Chandler v Brittain, 48 GaApp 361, 172 SE 745

<sup>69</sup> McCreight v Peoples Motor Coach Co, Circuit Court, Marion County, Indiana, No 39512

any such negligence proximately contributed to the alleged collision and damages, the plaintiff cannot recover.<sup>70</sup>

(3) If the jury find from the evidence that the plaintiff, L M L., was the owner of the automobile in question and that at the time in question, the control and operation of the machine was under the control and possession and operation of her husband, A L, then you are instructed that any negligence of A L, if you find that he was guilty of negligence, becomes and is the negligence of the plaintiff, L. M L.<sup>71</sup>

(4) If you find from a fair preponderance of the evidence in this case that the driver of the plaintiff's automobile was operating the same at his direction and as his agent, then you are instructed that the plaintiff in this case would be liable for any negligent acts on the part of the driver of the plaintiff's car, and if you so find that the driver of the plaintiff's car was the agent of the plaintiff at the time of the collision and was operating it at the direction of the plaintiff and so operating it negligently, if you so find, and the negligence of the plaintiff's driver contributed proximately to the damages sustained by the plaintiff, if you so find that plaintiff sustained damages, you are then instructed that the acts of the driver, if found to be negligent, would amount to contributory negligence on the part of the plaintiff and the plaintiff could not recover even if the defendant was guilty of some negligent act

(5) If you find from a fair preponderance of the evidence in this case that the plaintiff's automobile was being operated by his wife at a time when she was not acting as the agent of her husband or driving the same under his direction, then I instruct you that any negligence on the part of the operator of the plaintiff's car would not amount to contributory negligence and that the plaintiff could not have the negligence of the driver of his car imputed to him, and in this case, if you so find, the only questions for your determination in this cause are, first, was the defendant guilty of any one or more of the acts of negligence charged against him in the plaintiff's complaint, and second, has the plaintiff been damaged, and if so, in what amount? Not however, to exceed the amount as prayed for in the plaintiff's complaint.<sup>72</sup>

<sup>70</sup> Davis v Borcharding, Circuit Court, Marion County, Indiana, No 40944

<sup>71</sup> Lewis v Spaulding, Superior Court, Lake County, Indiana, No

23170

<sup>72</sup> Lee v Layton, Municipal Court, Marion County, Indiana, No 7165, see 95 IndApp 663, 167 NE 540

**§ 414. Injuries to pedestrians in general.****Alabama**

Y (the driver) had the right, exercising reasonable care, to drive past the point where the plaintiff was standing, and was not required to stop his automobile before proceeding past such point, unless he had reasonable cause to believe that so driving past would endanger the plaintiff. <sup>73</sup>

**Arizona**

The fact that travel on the highway, when the vision is poor or obscured by reason of dust in the air and the glare of headlights, is attendant with danger is an admonition to the motorist as well as the pedestrian to proceed with greater caution and care than if these conditions did not exist

The person having the management of the automobile and the traveler on foot are both required to use such reasonable care, circumspection, prudence, and discretion as the circumstances require; an increase of care being required where there is an increase of danger. And both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable care as ordinarily careful and prudent persons would exercise under like circumstances. The more dangerous the character of the vehicle or machine, and the greater its liability to do injury to others, the greater the degree of care and caution required in its use and operation. And a person traveling by foot on a public road is required to use reasonable care to avoid collision with a vehicle, and, if he saw the vehicle before it struck him, or by the reasonable use of his senses could have seen it in time to avoid the injury, it is his duty to do so <sup>74</sup>

**Arkansas**

Drivers of automobiles and pedestrians both have a right to the street, but the former must anticipate the presence of the latter and exercise reasonable care to avoid injuring them. <sup>75</sup>

**California**

(1) I instruct you that while the automobile driver and the pedestrian are charged with the same degree of care, the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of a pedestrian.

I instruct you that a person lawfully and carefully using

<sup>73</sup> Brown v Yielding, 206 Ala 504, 90 S 499. See also Vansandt v Biewer, 209 Ala 131, 95 S 463.

<sup>74</sup> Coe v Hough, 42 Ariz 293, 25

P2d 547

<sup>75</sup> Murphy v Clayton, 179 Ark 225, 15 SW2d 391



a street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows pedestrians to assume that motor vehicle drivers will obey and abide by the traffic laws and regulations <sup>76</sup>

(2) You are further instructed that the act of a pedestrian on a public highway in running in front of an automobile, as the result of fright or terror, caused by the sudden discovery of the automobile near her, or by a noise caused by the automobile, does not necessarily constitute contributory negligence on her part, or, in other words, if the act of the defendant caused fear and loss of presence of mind on the part of the plaintiff, so as to impel her to rush into danger, as stated before, her mere error or mistake of judgment in so acting shall not be taken by you to be contributory negligence on her part <sup>77</sup>

(3) It is the duty of a pedestrian traveling in or crossing a public street to use ordinary care and to reasonably exercise for his personal safety the faculties with which he is endowed by nature for self-protection, and if he fails to do so and is injured by reason of such failure, he cannot recover on account of such injury. And if you believe from the evidence that plaintiff by the reasonable use of the faculties given him by nature for his self-protection, could have avoided the accident and that his failure to do so contributed toward the accident, then your verdict should be for the defendant <sup>78</sup>

(4) You are further instructed that the law does not require of a pedestrian that he must look in every direction every instant of his progress. It does require that he must look at least in those directions from which danger may be easily apprehended as often and as carefully as would a person of ordinary prudence under like circumstances

The operator of an automobile is not necessarily exempt from liability for injuries occurring in a public street or highway by showing simply that at the time of the accident he was running at a rate of speed allowed by law. He still remains bound to anticipate that he may meet persons at any point on the street or highway, and he must, in order to avoid the charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with other persons using proper care and caution, and, if the situation requires it, he must slow up and stop. <sup>79</sup>

<sup>76</sup> *Pinello v Taylor*, 128 CalApp 508, 17 P2d 1039

<sup>77</sup> *Raymond v Hill*, 168 Cal 473, 143 P 743

<sup>78</sup> *Straten v Spencer*, 52 CalApp 98, 197 P 540

<sup>79</sup> *Ballos v Natural*, 93 CalApp 601, 269 P 972

(5) I instruct you that it is part of the duty of an operator of a motor vehicle to use ordinary care to keep his machine always under control so as to avoid collision with other persons lawfully using the highway and who are themselves in the exercise of ordinary care. He has no right to assume that the road is clear. Accordingly, if the operator of the vehicle should in the exercise of ordinary care have become aware of the presence of another in time to have avoided colliding with such other person, then the fact that he failed to become aware of the presence of the other is no excuse for conduct which would have amounted to recklessness if he had known of the presence of such person.<sup>80</sup>

#### Connecticut

(1) The court instructs the jury that if the deceased saw the automobile coming when the automobile was 150 feet away from him, as was testified to by one of the plaintiff's witnesses, and shouted to the driver of it to keep out of the way, it was his duty to remove himself to a safe position, where he would not be struck by the automobile if he could have done so by the exercise of reasonable care after the danger was or should have been apparent to him. The deceased was bound to exercise reasonable care to protect himself from injury, and, if he knew the automobile was coming, it was his duty to exercise reasonable care to get out of the way of it, that is, the moment that he saw, or as a reasonable man ought to have apprehended, danger from it.<sup>81</sup>

(2) As to the matter of sounding of a horn or other warning, due care requires that when the operator of a motor vehicle sees a pedestrian in or about to enter his course, he shall sound his horn or otherwise give warning of his approach. You will inquire, first, whether under the conditions existing due care required the defendant to give such warning of his approach, and, if you determine that such warning was required, you will decide whether such warning was given by him as reasonable care required. In this connection I am requested to charge you, and do, that the mere sounding of a horn or signal is not in itself sufficient to give immunity from liability, but the operator must also operate his car under such a degree of control as reasonable care requires.<sup>82</sup>

#### Florida

A person running an automobile is bound to take notice of

<sup>80</sup> *Morris v Purity Sausage Co*, 2 A 518  
CalApp2d 536, 38 P2d 193

<sup>82</sup> *Demonde v Targett*, 97 Conn

<sup>81</sup> *Case v Clark*, 83 Conn 183, 76 59, 115 A 470

a person standing or walking in the roadway and to use due care not to injure him needlessly

The automobile or vehicle, while an instrument of great utility, is also, when carelessly operated, a dangerous agency; and when operated in or along public highways should be operated with due and reasonable care for the safety of pedestrians as well as persons traveling in other vehicles along said highway.<sup>83</sup>

#### Georgia

(1) A pedestrian and a motorist each have the right to use the public highway, but the right of an operator of an automobile upon the highway is not superior to the right of the pedestrian, and it is the duty of each to exercise his right with due regard to the corresponding rights of the other.

The driver of an automobile is bound to use reasonable care and to anticipate the presence on the streets of other persons having equal rights with himself to be there, and a pedestrian, when lawfully using the public highways, is not bound to be continually looking and listening to ascertain if auto cars are approaching, under the penalty if he fails to do so and is injured, it must be conclusively presumed that he was negligent.<sup>84</sup>

(2) I charge you that when an automobile driver is approaching a pedestrian on a public highway, it is the duty of the driver of the automobile to warn the pedestrian of his approach by the sounding of a horn, gong or bell, and a failure to do so would be negligence on the part of such driver of the automobile.<sup>85</sup>

#### Idaho.

You are instructed that pedestrians have a right to use a highway, and one driving an automobile should use such care in passing pedestrians as a reasonably prudent person would use under all the circumstances.<sup>86</sup>

#### Indiana

I instruct you, gentlemen of the jury, that the driver of an automobile must know that other persons have a right to use a street to cross the same, and it is the duty of the driver of the automobile to anticipate that the street will be used by pedestrians, and, therefore, it is also the duty of the

<sup>83</sup> Florida Motor Transp Co v Hillman, 87 Fla 512, 101 S 31

<sup>84</sup> Huckabee v Grace, 48 GaApp 621, 173 SE 744

<sup>85</sup> Garlin v Thomas, 90 GaApp 835, 84 SE2d 491

<sup>86</sup> Quillin v Colquhoun, 42 Idaho 522, 247 P 740

driver to look, to see, and know that such pedestrian is not in his road, and a driver must operate an automobile at such speed that persons rightfully in, or attempting to cross such street, shall not be injured by the reason of the failure to stop such automobile and thereby avoid injuring them.<sup>87</sup>

#### Kansas

(1) You are instructed that it is the duty of anyone using a public street, either as a pedestrian or in driving an automobile thereon, to look ahead and see whatever there may be in the line of his or her vision which should affect the use of said street, and such person is in law presumed to have seen what they could or should have seen, had they kept a proper lookout<sup>88</sup>

(2) You are instructed that so far as the use of the public streets of a populous city is concerned, persons walking upon the street and those riding in or driving an automobile have each an equal right to the free use of any portion of said street, not then in use by another, and each having a right to its free use, there devolves upon each and both a corresponding duty to employ equal care for their personal safety, and the degree of care which is required of each and both of them is ordinary care, as the same has been hereinbefore explained to you.<sup>89</sup>

#### Kentucky

(1) There is no imperative rule of law requiring a pedestrian, when lawfully using the public ways, to be continuously looking or listening to ascertain whether vehicles are approaching, under the penalty that upon the failure so to do if he is injured his own negligence must be conclusively presumed.<sup>90</sup>

(2) Defendant was required to have his automobile under reasonable control, operate it at a rate of speed that was reasonable and proper, having regard for the traffic conditions and the use of the highway at that time and place, and to keep a lookout ahead for persons or other vehicles in front of him or so near thereto as to be in danger of collision<sup>91</sup>

(3) Where a person leaves a place of safety and steps, walks, or runs in front of an approaching vehicle so suddenly and so close to it that the driver, by the exercise of ordinary care with the means at hand, could not have avoided the accident

<sup>87</sup> *Lauer v Roberts*, 99 IndApp 241, 226 P 774  
216, 192 NE 101

<sup>88</sup> *Coughlin v Layton*, 104 Kan  
752, 180 P 805

<sup>89</sup> *Crowder v Williams*, 116 Kan

<sup>90</sup> *Foreman v Western Union Tel  
Co.*, 228 Ky 300, 14 SW2d 1079

<sup>91</sup> *Lieberman v McLaughlin*, 233  
Ky 763, 26 SW2d 753

if the vehicle had been running at a reasonable rate of speed, and such person is injured by such vehicle under these circumstances, the operator of the vehicle is not liable for such injuries <sup>92</sup>

(4) The driver of an automobile may be proceeding with the utmost degree of care and yet an occasion may arise where it is necessary for him to sound his horn in order to fully comply with his duty, and when such an occasion does arise, he cannot be excused on the ground that he was proceeding with his automobile in the exercise of ordinary care for the safety of others. He must give the required signal to warn others of his approach if he would be fully excused <sup>93</sup>

#### Missouri

The court instructs the jury that any person operating an automobile running on, upon, along or across a public road, street or highway, or place much used for travel, is required to use the highest degree of care that a very careful person would use under like and similar circumstances to prevent injury or death to persons on or traveling over, upon or across such public road, street or highway or place much used for travel. <sup>94</sup>

#### Montana

You are instructed that a person on the highway and a driver of an automobile have equal rights in the use of public highways, and neither may, with propriety, infringe upon or disregard the rights of the other. The driver of an automobile and a person on a highway are both required to use such reasonable care as the circumstances of the case demand, and an exercise of greater care on the part of each is required where there is an increase of danger. Each must exercise the right in a reasonable and careful manner so as to cause no unreasonable abridgement or interference with the rights of another. <sup>95</sup>

#### New Jersey

(1) If the defendant's view was obstructed by a preceding car, it was his duty to put his car in check, or stop it altogether until the obstruction was removed <sup>96</sup>

(2) The duty of exercising reasonable care between persons using the highway is mutual, and each person may assume

<sup>92</sup> Fork Ridge Bus Line v Matthews, 248 Ky 419, 58 SW2d 615

<sup>93</sup> Best's Admr v Adams, 234 Ky 702, 28 SW2d 484

<sup>94</sup> Robertson v Scoggins (Mo App), 73 SW2d 430

<sup>95</sup> Fulton v Chouteau County Farmers' Co, 98 Mont 48, 37 P2d 1025

<sup>96</sup> Rigg v Lewis, 7 NJMiscR 290, 145 A 223

that others traveling on the highway will comply with that obligation. A pedestrian has a right to assume that the driver of an automobile will exercise proper caution in approaching a street crossing.<sup>97</sup>

#### New York

A collision between a pedestrian and a motor car raises no presumption that the operator of the car was negligent.<sup>98</sup>

#### Ohio

It was the duty of the defendant in driving his automobile to use ordinary care, such as would have enabled him to observe the danger to the plaintiff, whether plaintiff was prudent or careful, or whether the plaintiff was neglectful in observing the car of the defendant as it was passing along the street and approaching her.

A driver of an automobile in the streets of a city may observe, and this defendant should have observed, such watchfulness as ordinary care and prudence demands for pedestrians or travelers in the street, and must have his car under ordinary control, and must take such steps in the handling of the car as ordinary care and prudence in such case demand, as will enable him to avoid injury to others who have equal rights in the streets.<sup>99</sup>

#### Oregon

Now, gentlemen of the jury, the rights and duties of drivers of automobiles and pedestrians upon the public highways of this state are equal and reciprocal. Each has the right to the reasonable use of the public highway, and it is the duty of each to use and exercise reasonable care to avoid colliding one with the other.

Now, gentlemen of the jury, one of the issues in this case for you to determine is whether or not the plaintiff was guilty of negligence in failing to keep a proper or any lookout for his own safety. Now, in this connection, you will determine from the evidence whether the plaintiff made or kept such a lookout for his own safety as would have been made or kept by an ordinarily prudent person. If you find from the evidence that he did keep such a lookout for cars traveling on and along the highway as would have been made or would have been kept by an ordinarily prudent person, then the plaintiff would not be guilty of negligence in this respect. But if you find that he

<sup>97</sup> Clarkson v. Ley, 106 NJL 380, 146 AppDiv 608, 131 NYS 357  
148 A 745  
<sup>98</sup> Cohen v. Smith, 26 OhApp 32,  
<sup>99</sup> Marius v. Motor Delivery Co., 159 NE 329

failed to make or keep such a lookout as would have been made or kept by an ordinarily prudent person, then he would be guilty of negligence. And if you find that he was so guilty of negligence in this respect and that such negligence contributed proximately to the accident, then the plaintiff cannot recover and your verdict must be in favor of the defendants.<sup>1</sup>

#### Utah

You are instructed that contributory negligence is the failure to use that ordinary care and diligence that would be expected of an ordinarily prudent person of similar age and experience to that of the deceased, O M., under like circumstances to avoid an injury. Therefore, even though you find that the defendants were negligent, still, if you find that the deceased, O M., did not exercise that ordinary care and diligence to prevent injury to himself that would be expected of ordinary and prudent persons of similar age and experience situated as O. M. was, you should find for the defendants and against the plaintiff, no cause of action.<sup>2</sup>

#### Virginia.

(1) When the driver sees an adult, in the apparent possession of his faculties, on or near the highway in a place of safety, he may presume that such adult will remain in a place of safety.<sup>3</sup>

(2) The court instructs the jury that one driving an automobile along a public street is charged with the duty of keeping a proper lookout, and if you find from the evidence that the defendant failed in this duty, and that such failure caused the injury to the plaintiff, I. C., without negligence on her part and while she was exercising reasonable care for her own safety, you must find for the plaintiff.<sup>4</sup>

#### Washington.

(1) You are instructed that automobile or bus drivers passing along the street are required to use the right-hand side of the street, and especially so where there are other automobiles or persons rightfully using the street either along its general route or at intersections.<sup>5</sup>

(2) I instruct you that the plaintiff, while walking on the public streets of the city of Seattle, at the time and place of the

<sup>1</sup> Snabel v Barber, 137 Or 88, 300 P 331

<sup>2</sup> Morgan v Bingham Stage Lines Co., 75 Utah 87, 283 P 160

<sup>3</sup> Price v Burton, 155 Va 229, 154 SE 499 See also Trauerman

v. Oliver's Admr, 125 Va 458, 99 SE 647

<sup>4</sup> Lucas v Craft, 161 Va 228, 170 SE 836

<sup>5</sup> Jurisch v Puget Transp Co, 144 Wash 409, 258 P 39.

accident in question, was required to make reasonable use of his senses in order to avoid impending danger, and if he failed so to do, and was injured by reason of such failure, he is guilty of such negligence as will preclude a recovery by him for the injuries, if any, sustained by him. Such reasonable use of the senses means such use as an ordinarily prudent and careful person would have used under like circumstances and conditions, and so in the case before you, if you find that the plaintiff observed the automobile of the defendant before the collision, or by reasonable use of his senses could have observed the said automobile in time to avoid a collision, then he cannot recover damages from the defendant in this case, and your verdict must be for the defendant <sup>6</sup>

**Wisconsin**

(1) You are further instructed that a pedestrian, after making observation and ascertaining that there were no automobiles or other vehicles in his vicinity or dangerously near, may proceed to cross a city thoroughfare.

If at the time a pedestrian leaves the curb, he observes the street is clear and that there are no vehicles on the street for a distance greater than that which would be covered by a vehicle operating at a lawful rate of speed in order to reach the pedestrian's line of operation, he may proceed on the assumption that all vehicles not within such distance will be operated at a lawful rate of speed <sup>7</sup>

(2) A pedestrian desiring to cross a highway in advance of an approaching automobile has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the point of intersection of his line of travel with that of the approaching automobile without interfering with the movement of the automobile to pass the point of intersection, and in so doing he has the right to assume that the automobile is approaching at a reasonable and lawful rate of speed <sup>8</sup>

(3) The court instructs the jury that, on the other hand, every operator of an automobile has the right to assume and act upon the assumption that every person whom he meets on the street will exercise ordinary care and caution, according to the circumstances, to avoid injury, and that he will not expose

<sup>6</sup> *Moy Quon v M Furuya Co*, 262, 164 NW 999  
81 Wash 526, 143 P 99

<sup>8</sup> *Keicher v Michael*, 196 Wis 305,  
<sup>7</sup> *Klochow v Haibaugh*, 166 Wis 220 NW 179



himself to danger, negligently or recklessly, but will, as is his duty, exercise ordinary care to keep a careful lookout, to listen for approaching vehicles, to avoid a collision, and if he sees or hears a vehicle before it strikes him, or by the reasonable use of his senses could see or hear it in time to avoid the injury, that he will, promptly, in the exercise of ordinary care, attempt to avoid the injury.<sup>9</sup>

(4) The defendant was not required to have his car under instant control at this point, and what would be negligence in defendant if this accident happened at a regular crosswalk would not constitute negligence in this case where the accident occurred, not on a regular crosswalk.

The defendant had a right to assume that the plaintiff would obey the law and would cross at a regular crosswalk. He also had a right to assume that the plaintiff was not intoxicated and was in a position to see an oncoming car and protect himself. He was not required to drive his car at such a rate of speed that he could avoid hitting a man who appeared suddenly not on a crosswalk and not in a condition to protect himself.<sup>10</sup>

#### § 415. — Crossing street or highway.

##### Federal

##### District of Columbia

The jury are instructed that it was the duty of the plaintiff in crossing New York Avenue to exercise for her own safety the care which a reasonably prudent and careful person would exercise under all the circumstances; and if you believe from the evidence that the plaintiff in crossing New York Avenue failed to exercise such care in any respect, and that such failure on her part contributed to the accident in question, then your verdict should be for the defendant, unless the defendant shall be found liable under the instruction next to be given.

The jury are instructed that the burden of proof that the defendant saw, or could by the exercise of reasonable care have seen, the plaintiff after she was in a position of danger, and at that time could have stopped the truck, or avoided the accident, is upon the plaintiff, and she must prove each of these facts by a preponderance of the evidence. And if the evidence as to any of them fails to sustain such burden of proof, or is equally balanced, or preponderates in favor of the defendant, then your verdict should be in favor of the defendant. The jury

<sup>9</sup> *Becker v West Side Dye Works*,  
172 Wis 1, 177 NW 907

<sup>10</sup> *Benedict v Berg*, 229 Wis 1,  
281 NW 650

are instructed, in considering these instructions, that due care depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances.<sup>11</sup>

#### New York

And I charge you, gentlemen, while Mrs G says she did look both ways, and she saw nothing coming from the south at this time, and that she looked up north and saw what she did, I charge you that, even if she did not, she was not, as a matter of law, required to look both ways. She, in passing there, not knowing of the obstruction, not knowing of the tie-up, if that is the truth, would have no reason, perhaps, to believe that automobiles, or other vehicles, would come northerly on the westerly side of the avenue, and so the degree of caution and care required of her would not be as great as it would have been had she known of a block. If she did not know of it—it is for you to say whether she did or not, taking all the evidence into consideration—the degree of care demanded by the conditions in her knowledge would not have been as great as it would have been had she known of that block, and that vehicles might pass up on the westerly side. All that you will consider in determining what her actions were.<sup>12</sup>

#### Alabama.

(1) The court charges the jury that, if they believe from the evidence in this case that the way was clear for the defendant's automobile when the same was proceeding toward the point where the accident occurred and immediately before it reached said point, then the driver in charge of said automobile, if he was otherwise free from negligence, had a right to reasonably indulge the presumption that no person would suddenly run from the side of the road into his line of travel.<sup>13</sup>

(2) Now, gentlemen, another question comes up, and that has to do with the question of right of way. It would not come in the event that you find that the plaintiff was injured on the left-hand side of the highway. If you find that the defendant was operating the automobile down the left-hand side of the highway at that time, then the law would not say that either one had the right of way in respect to the matter. If the defendant was operating the automobile down the right-hand side of the highway, at a proper and prudent rate of speed, then it would have been the duty of the driver of automobile to have

<sup>11</sup> New York Transp Co v Gar-side, 85 CCA 285, 157 F 521

<sup>12</sup> Chr Heurich Brew Co v Mc-

Gavin, 56 AppDC 389, 16 F2d 334

<sup>13</sup> Louis Pizitz Dry Goods Co v Cusmano, 206 Ala 689, 91 S 779

yielded, the law being that when pedestrians are crossing, and meet with automobiles at intersections, if they approach there approximately at the same time, it is the duty of vehicles to give way and yield to the pedestrians. It is a violation of the law to cross in the business section elsewhere than at intersections. Out in residential sections, as well as the place where this accident occurred, a pedestrian has the right to cross a street at a place other than a street intersection, and it is not a violation of the law for him to cross the street at a place which is not a street intersection; but where he does undertake to cross at a place which is not a street intersection and there is a vehicle approaching, it is his duty, if the vehicle is proceeding at a lawful and proper rate of speed, to wait and allow the vehicle to pass ahead of him; also provided the vehicle is on the right-hand side of the road. He is under no duty to keep a lookout for vehicles which are approaching on the left-hand side of the road. That is to say, taking this particular case that is now before you, gentlemen, if the plaintiff was struck on the left-hand side of the road, he would have the right to rely and to assume that the vehicles approaching from the south and moving to the north, until he had some cause to believe, or some reasonable ground to conclude otherwise, that vehicles driven from the south to the north, would observe the rule of the road that requires the vehicles to travel on the right-hand side of the road in which they are proceeding. Of course, if he did observe it, or if he had reason to believe that a vehicle was approaching on Fiftieth Street, going from the south to the north, and it was going on the left-hand side of the road, or if it came to his attention that a vehicle was approaching on the left-hand side of the road, then, of course, it would be his duty, in the light of that knowledge and in the light of those circumstances, to do what an ordinarily prudent person would have done under the same or similar circumstances to protect himself from injury <sup>14</sup>

(3) I charge you, gentlemen of the jury, that if you are reasonably satisfied from the evidence in this case that W T S [plaintiff's decedent] started across Highway No — on the evening of ———, 19—, without looking up or down the highway for approaching automobiles, and if you are further reasonably satisfied from the evidence that W T S did not exercise due and reasonable care in crossing the highway at that time and place, and that the failure to look and exercise

<sup>14</sup> J C Byram & Co v Livingston, 225 Ala 442, 143 S 461

such due care proximately caused W T S to be struck by defendant's automobile, you cannot find for plaintiff <sup>15</sup>

#### Arkansas

Drivers of automobiles in approaching street crossings or an intersecting street must have their automobiles under control, prepared to stop if automobiles or other vehicles or pedestrians are passing over the intersection. Danger may always be expected or anticipated at street crossings or at intersections of streets, and every driver of an automobile should keep a lookout and approach same with his machine under control, else he cannot be regarded or treated as exercising ordinary care <sup>16</sup>

#### California

(1) I instruct you that a person lawfully and carefully using a street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows pedestrians to assume that motor vehicle drivers will obey and abide by the traffic laws and regulations <sup>17</sup>

(2) A person crossing a street in front of an approaching vehicle cannot close his eyes to threatening danger, relying upon the presumption that the other party will use reasonable care and prudence, and obey the traffic laws, but if there is nothing in the situation to warn him of impending danger, he is not guilty of negligence in relying upon such assumption <sup>18</sup>

(3) In determining whether a pedestrian used such due care as is commensurate with apparent present dangers, the jury should consider the location involved, the existing state of the traffic, the opportunity for obtaining a clear view of the street from every direction whence approaching vehicles might endanger an attempt to cross the street, the presence of obstructions to the view such as buildings, passing cars, driving storms, clouds of dust, or darkness, and, from these and all other facts and circumstances present, determine whether the particular pedestrian used that degree of care which would be required of an ordinarily prudent person under like circumstances <sup>19</sup>

(4) You are further instructed that if you believe from the evidence that the plaintiff, S P, without any negligence on her

<sup>15</sup> Smith v Lilley, 252 Ala 425, 41 S2d 175, affirming judgment for defendant

<sup>16</sup> Smith Arkansas Traveler Co v Simmons, 181 Ark 1024, 28 SW 2d 1052

<sup>17</sup> Dullanty v Smith (CalApp),

260 P 337, see 203 Cal 621, 265 P 814

<sup>18</sup> Cummins v Yellow & Checker Cab Co, 127 CalApp 107, 15 P2d 536

<sup>19</sup> Azzaro v O'Connell, 121 Cal App 617, 9 P2d 345

part was crossing Geary Street at its intersection with Ninth Avenue along and within the pedestrian lane of such intersection, when traffic signals or controls at such intersection showed a "stop" traffic signal to traffic moving westerly along Geary Street, I charge you that said plaintiff, S P, was entitled to assume that such traffic signal would be obeyed by a driver of an oncoming automobile being driven in a westerly direction along Geary Street and approaching the intersection at such time <sup>20</sup>

(5) You are further instructed that plaintiff had the right to take a place of safety at the intersection of Thirty-fourth Street and San Pablo Avenue in crossing said San Pablo Avenue, and plaintiff had the right to assume that any vehicle coming from the direction of the approaching traffic from the north would observe the statutory regulation as to the rate of speed and that any vehicle would not attempt to overtake another vehicle at the intersection of Thirty-fourth and San Pablo Avenue unless directed so to do by a traffic or police officer <sup>21</sup>

(6) If the jury find from the evidence that the person in charge of defendant's automobile was driving the same backward in a northerly direction on the west side of Powell Street, and did not look in the direction that said auto was running to ascertain if anyone was traveling upon or crossing said street in his immediate vicinity, and, in consequence, ran into and injured the plaintiff, then the defendant was guilty of negligence

In determining whether the defendant's chauffeur was guilty of negligence resulting in plaintiff's injury, you should consider all the facts of the case, the direction in which the car was traveling, the rate of speed it traveled, whether the chauffeur gave any signal or warning before turning, or while traveling backwards, the condition of the street, the situation and surroundings of the parties, the manner in which plaintiff was crossing the street, and what observation, if any, the chauffeur made while backing his car <sup>22</sup>

(7) If you believe from the evidence that Mrs S, upon seeing the plaintiff at the crossing start to cross the street, checked her car to allow plaintiff to pass, and that plaintiff instead of going on turned back, and that Mrs S then proceeded on her way, that plaintiff then again started across, and that to avoid hitting the plaintiff Mrs S turned to the left-hand

<sup>20</sup> *Pinello v Taylor*, 128 CalApp 444, 251 P 952  
508, 17 P2d 1039

<sup>22</sup> *Sheldon v James*, 175 Cal 474,

<sup>21</sup> *Lower v Hughes*, 80 CalApp 166 P 8, 2 ALR 1493

side of the street, then I charge you that the fact that she was on the left-hand side of the street at the time her car struck the plaintiff raises no presumption that she was guilty of negligence in being there.<sup>23</sup>

(8) The duty of the pedestrian is to look in the direction from which traffic is to be expected. Failing so to do, he would be guilty of contributory negligence, but if he fails to observe an automobile approaching from the wrong direction, the pedestrian is not guilty as a matter of law for failing to observe the same.<sup>24</sup>

(9) You are further instructed that, if you should find from the evidence that the plaintiff, immediately before she started to cross the street, looked to her left to observe whether there were approaching vehicles, and continued looking to her left until she reached the center of the street, and if you further find that she had reached a place on the street where, if the defendant operated his automobile in accordance with the provisions of the law, she would have been out of the danger zone, then the failure of plaintiff to continue to look to the left would not preclude a recovery, because of her right to rely upon the use of the street by the defendant N in a lawful manner, and of her right to expect the automobile to be at a place where under the law it had a right to be.

You are instructed that the duty of a pedestrian to look both ways upon a street does not necessarily cease when he or she steps from the curb to the street, but such duty was incumbent upon her in this case at all times while she was in a position which might be one of peril from vehicles approaching from either side, and this duty continued upon her until she was completely across the street. Therefore, you are instructed that, if the plaintiff in this case entered upon the public street in question, and walked across said street from north to south thereof, it was her duty, while thus walking, to protect herself by maintaining a lookout to her right and to her left, to ascertain whether or not vehicles were approaching from either direction.

This was a continual duty on her part to protect herself from injury by approaching vehicles, and, if she failed to exercise such care as above outlined, such failure on her part would be negligence, and, if this negligence contributed directly or proximately to the happening of the accident in any degree, however slight, the plaintiff cannot recover, and your verdict will

<sup>23</sup> *Straten v Spencer*, 52 CalApp 98, 197 P 540

<sup>24</sup> *Rinker v Carl*, 102 CalApp 436, 283 P 317

be for the defendants, notwithstanding the fact you may believe the defendants themselves were guilty of negligence

This instruction is to be taken in connection with the one heretofore given, that the plaintiff, after she reached the center of the street, might assume, without contributory negligence on her part, that the defendant would not be approaching on the wrong side of the street, that is, that it was not contributory negligence on her part not to look to her left after she reached the center of the street That instruction, I say, is to be taken in connection with this one <sup>25</sup>

(10) A pedestrian who attempts to cross a street at other than a regular crossing place must exercise greater precautions than at an established crossing The observance of due care under such circumstances is not fulfilled by merely looking to the left and right as he steps upon the street; he must exercise that care during all the time that he is crossing <sup>26</sup>

#### Connecticut

Before the doctrine of supervening negligence \* \* \* can be applied in this case, the jury must be in a position to conclude from the evidence that there was a time after the plaintiff started to cross the traveled portion of Connecticut Avenue, when Mr H was sufficiently distant from the plaintiff so that he, Mr H, should have seen the plaintiff and realized that he was either unconscious of the approach of the automobile or for some other reason, would not guard himself from danger, and thereafter with the exercise of due care, could have avoided striking the plaintiff Unless such an opportunity were reasonably present for the defendant, Mr H, to stop his car after the plaintiff's position of peril should have been known to him, and unless the jury so find and also find that Mr H should have known then that the plaintiff would not avail himself of an opportunity to escape, the jury will have no occasion to give further consideration to this contention <sup>27</sup>

#### Delaware

A traveler on foot has the same right to the use of the public streets of a city as a vehicle of any kind In using any part of the streets, all persons are bound to the exercise of reasonable care to prevent collisions and accidents Such care must be in proportion to the danger or the peculiar risks in each case It is the duty of the person operating an automobile, or any

<sup>25</sup> Wright v Foreman, 86 CalApp 2 CalApp2d 536, 38 P2d 193

595, 261 P 481

<sup>27</sup> Paskewicz v Hickey, 111 Conn

<sup>26</sup> Morris v Purity Sausage Co, 219, 149 A 671

other vehicle, upon the public streets of a city to use ordinary care in its operation, to move at a reasonable rate of speed, and cause it to slow up or to stop if need be, where danger is imminent and could, by the exercise of reasonable care, be seen or known in time to avoid accident. Greater care is required at street crossings and in the more thronged streets of a city than in the less obstructed streets in the open or suburban parts. There is a like duty of exercising reasonable care on the part of the pedestrian. The person having the management of the vehicle and the traveler on foot are both required to use such reasonable care as the circumstances of the case demand, an exercise of greater care on the part of each being required where there is an increase of danger. The right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other, and both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances.

It is true that a person crossing a public street of a city is required to make reasonable use of all his senses in order to observe an impending danger, and if he fails to do so, and is injured by reason of such failure, he is guilty of such negligence as will prevent any recovery for the injury sustained. Such reasonable use of the senses, however, means such use as an ordinarily prudent and careful person would have used under like circumstances. And so in the case before you, if the plaintiff saw the automobile before it struck him, or by the reasonable use of his senses could have seen it in time to avoid the injury, he could not recover. But if he could not, under the conditions and circumstances existing at the time of the accident, by the exercise of reasonable care have avoided it, he would not be guilty of such negligence as would defeat his right to recover.<sup>28</sup>

#### Georgia

In approaching any person walking in the roadway or traveling any public street or highway, the operator of a motor vehicle shall at all times have the same under immediate control. It is the duty of an operator of a motor vehicle to have the same under immediate control both when he is conscious of the presence of a pedestrian on the highway and also when he

<sup>28</sup> *Grier v Samuel*, 4 Boyce (27 Del) 106, 86 A 209



should, by the exercise of ordinary care, have discovered the presence of such pedestrian.<sup>29</sup>

#### Indiana

(1) A pedestrian crossing the street has a right to assume that a motor vehicle will not approach either on the wrong side of the street or at an excessive rate of speed, having regard to the width of the highway, the density of traffic, the condition of the weather and use of the highway, and that the driver or operator thereof will not endanger him without warning, providing the pedestrian is in the exercise of ordinary care under all circumstances<sup>30</sup>

(2) You are instructed that if you find it to be a fact that defendant's automobile was being driven in the village of Arlington at a speed of 25 miles or more per hour, such fact does not necessarily prove that such rate of speed was greater than was reasonable or prudent. You may take into consideration the density of the traffic, the presence or absence of other vehicles on the highway and in the immediate vicinity where the collision occurred, the width of the paved portion of the street, the probability or improbability of there being traffic crossing the street, the fact that it was daylight, the conduct of the plaintiff and his apparent ability to avoid collision when discovered by the defendant, the opportunity of a pedestrian situated as was plaintiff when discovered to avoid collision by the exercise of ordinary care, and the opportunity of plaintiff to make timely discovery of the approach of the defendant's automobile, the condition of the surface as to being dry or otherwise, and all other facts and circumstances shown by the evidence and from all these facts determine whether or not under all the circumstances the automobile in question was being driven at a rate of speed greater than was reasonable and prudent. If you find from the evidence that defendant's automobile was not being driven at a rate of speed greater than was reasonable and prudent at the time of the accident in question, then the defendant was not negligent in driving his automobile at the speed he was driving at the time of the collision.<sup>31</sup>

#### Iowa

(1) A person crossing a public street of the city is required to make a reasonable use of all his senses in order to observe an impending danger, and if he fails so to do, and is injured by reason of such failure, he is guilty of such negligence as will

<sup>29</sup> Rutledge v Crowe, 91 GaApp 461, 183 NE 916  
795, 87 SE2d 242

<sup>30</sup> Garner v Morgan, 98 IndApp

<sup>31</sup> Livingston v Rice, 96 IndApp  
176, 184 NE 588

prevent any recovery for the injury sustained. Reasonable use of the senses means such use as an ordinarily prudent and careful person would have used under the circumstances.

A person has the right to cross a public street or highway at a point other than the one provided for pedestrians, but such person in attempting to cross a public street or highway at a point other than the one provided for pedestrians is required to use greater care than when such person crosses at a point provided for pedestrians. This constitutes and is ordinary care as herein defined, but you are instructed that ordinary care is a relative term, and always has reference to the circumstances of the case.<sup>32</sup>

(2) In determining whether or not plaintiff was guilty of contributory negligence, you should consider, as may appear from the evidence, the character of the intersection, the state of the weather, whether the place of crossing was light or dark, the traffic upon the street, and whether or not such traffic could, with reasonable diligence, have been observed by the plaintiff, whether or not he looked before or while he was in the street, his manner of crossing said street, and every other fact and circumstance which tends to show that he did or did not use care commensurate with the dangers to be reasonably apprehended, and did or did not use that degree of care which a reasonably careful and prudent person would have used in the same or similar situation.

It is the duty of a pedestrian in crossing a street to make such use of his senses of sight and hearing, and to take such measures for his safety and to avoid accidents, as an ordinarily careful and prudent person would take under the same or similar circumstances, but he is not necessarily negligent if he fails to keep a constant lookout for approaching vehicles.

If you find from the evidence that the plaintiff failed to make such use of his senses of sight and hearing and to take such measure for his safety and to avoid accident, as an ordinarily careful and prudent person would take under the same or similar circumstances, and that such failure contributed to cause the injury and damages complained of, then the plaintiff cannot recover, and your verdict should be for the defendants.<sup>33</sup>

#### Kansas

(1) Pedestrians crossing a street are not bound to be continually on the lookout to avoid injury from vehicles. While

<sup>32</sup> *Livingstone v Dole*, 184 Ia 1340, 167 NW 639

<sup>33</sup> *McElhinney v Knittle*, 199 Ia 278, 201 NW 586

they must be prudent themselves and use reasonable care for their own protection, they have the right to assume that automobile drivers will exercise a proper degree of care and will observe the traffic laws and ordinances <sup>34</sup>

(2) A traveler on foot is not necessarily negligent because he starts to cross a street without first looking or listening to ascertain whether an automobile is approaching, whether he should do so or not depends upon the circumstances and conditions of the particular act in question, and is to be determined by the jury in this case from the evidence herein <sup>35</sup>

(3) When plaintiff reached the center of Mill Street going in a northwesterly course, it was her duty under the law to look east along the north side of Mill Street before attempting to cross to the north side thereof, for cars that might be coming west on said north side of the street, and if she failed to do so, and you find and believe from the evidence herein and by so doing she would have seen defendant's car and could have stopped and thus avoided the injury, then she was guilty of negligence contributing to her injury, and she cannot recover herein, and your verdict must be in favor of defendant and against the plaintiff, notwithstanding the fact, if it be a fact, that defendant may have been guilty of negligence as charged by the plaintiff <sup>36</sup>

#### Kentucky.

(1) It was the duty of plaintiff not to attempt to cross the street against a red light forbidding travel in that direction

The driver of a car is not required to anticipate that a pedestrian seen in a place of safety will leave that place and get in the danger zone until some demonstration or movement on the part of the pedestrian reasonably indicates that fact <sup>37</sup>

(2) The exercise of ordinary care by a pedestrian includes within its scope and meaning, the use of the natural senses to discover the approach of automobiles and to avoid being struck when crossing or walking along highways <sup>38</sup>

#### Maryland

(1) The court instructs the jury that, if they find from the evidence that the plaintiff stepped or jumped in the way of

<sup>34</sup> Shrou v Bird, 135 Kan 218, 9 P2d 673

<sup>35</sup> Coughlin v Layton, 104 Kan 752, 180 P 805

<sup>36</sup> Crowder v Williams, 116 Kan 241, 226 P 774

<sup>37</sup> Peak v Arnett, 233 Ky 756, 26 SW2d 1035 See also Weidner v Otter, 171 Ky 167, 188 SW 335

<sup>38</sup> Jackson's Admr v Rose, 239 Ky 754, 40 SW2d 343

the automobile of the defendants when it could not be arrested in its course, and under circumstances where, with ordinary care on the part of the chauffeur in charge of said automobile, the automobile could not be brought to a pause early enough to save the plaintiff from injury, the defendants are not liable, and the verdict of the jury must be for the defendants.<sup>39</sup>

(2) The court instructs the jury that if they shall find from the evidence that on or about December —, 19—, W B W, the husband of the equitable plaintiff, while crossing North Avenue at or near its intersection with Pennsylvania Avenue, public streets of Baltimore, was injured by being struck and knocked down by an automobile operated by the defendant, of which injuries he thereafter died, and that said injuries resulted directly from the want of ordinary care and prudence of the defendant in operating and managing said automobile, and not from want of ordinary care and prudence on the part of said W B W, directly contributing to the said injuries, then the equitable plaintiff is entitled to recover in this action.<sup>40</sup>

(3) The right of way means the right to proceed. That right was not absolute, but relative. The direction of the traffic officer, inviting both the plaintiff and defendant to proceed, did not give to either of them a right to proceed superior to that given to the other. In exercising the right to proceed, each of them was bound to use that degree of care and caution to avoid inflicting or receiving injury which persons of ordinary care and prudence would have used under like circumstances. The degree of care required of each of them was the same, although the manner of its exercise differed because of the objects to which it was applicable. The pedestrian was unlikely to inflict injury upon others, and therefore, in accepting the invitation to cross the street, her principal concern was to avoid injury to herself. It was therefore incumbent upon her to use reasonable care to avoid placing herself in such a position that others operating such dangerous agencies as motor vehicles in the lawful use of the highway, and in the exercise of reasonable care, might be unable to avoid injuring her.

It was, however, the duty of the defendant and his agents, operating a powerful and heavy automobile on a city street at a point where pedestrians had a right to be, to exercise constantly the utmost vigilance to anticipate their presence, and to have the automobile under such control, and to so operate it as

<sup>39</sup> Epstein v Ruppert, 129 Md 432, 99 A 685

<sup>40</sup> Riley v State ex rel Walker, 140 Md 137, 117 A 237

to avoid injuring them while they were in the lawful use of the highway, in the exercise of reasonable care

When the traffic signal released the east and west-bound traffic on North Avenue, the plaintiff was permitted to cross Linden Avenue, and the defendant to turn into Linden Avenue and proceed north. If, while the automobile was far enough away to permit the driver thereof, by the exercise of reasonable care and caution, to have discovered her intention and to have avoided striking her, the plaintiff had actually accepted the invitation to cross the street, and was crossing it, she had the right to continue her course without interruption, and to assume that the driver of the automobile would respect her right to proceed. If, on the other hand, she had not started across the street until the automobile had reached such a position that the driver thereof could not, by the exercise of every reasonable care and precaution, have discovered her intention to cross the street, in time to have avoided striking her if she attempted to cross it, then the driver had the right to proceed and to assume that she would not leave a place of safety and place herself where he could not, by the exercise of all reasonable care and caution, avoid striking and injuring her.

The rights of each were relative and reciprocal. Each was bound to anticipate the presence of the other, and to take cognizance of the physical properties of the automobile operated by the defendant's agent, as well as of the fact that the invitation given by the traffic signal was to both of them.<sup>41</sup>

#### Massachusetts

There is a presumption that every person is in the exercise of due care \* \* \*. When evidence is introduced \* \* \* then the presumption fades away and the actual evidence \* \* \* will control. While Mr. B is presumed to have been in the exercise of due care, when the evidence comes in as to what he was doing, whether he was doing what a reasonably prudent person would do in crossing a thoroughfare which is traveled to the extent which this is, then it is for you to say, bearing in mind the said presumption, whether those facts show that he was not in the exercise of due care in whatever he did. And if he was in the slightest degree careless, negligent, no matter what his injuries may have been, no matter how negligent the person who struck or hit him or did other injury to him may have been, he cannot recover. \* \* \*. But the burden of showing that he was not in the exercise of due care rests upon the de-

<sup>41</sup> Panitz v Webb, 149 Md 75,  
130 A 913

fendant, whereas, the burden of showing negligence on the part of the defendant rests upon and is with the plaintiff.<sup>42</sup>

**Michigan**

(1) I further instruct you that the plaintiff's decedent had the right to cross Page Avenue between intersections and that his right to the use of the street as a pedestrian was reciprocal with the right of the defendant in that regard. I instruct you that the plaintiff's decedent had a right to start walking across the street and he would not be negligent in so doing, if, under the circumstances, it reasonably appeared to him that he could cross the street in safety and said plaintiff's decedent had the right to assume that the drivers of automobiles on said highway would operate such automobiles with due care and take reasonable observation of the path ahead of such automobile.

I further instruct you that it is not enough that the driver be able to stop within the range of his vision or that he use diligence to stop after discerning an object. The rules make no allowance for delay in action. He must, on peril of legal negligence, so drive that he can actually discover an object, perform the manual acts necessary to stop, and bring the car to a complete stop within such range, if necessary to avoid collision with and injury to others on the highway. If his vision is interfered with by any condition so that he cannot see the required distance ahead he must bring his car to such control that he can stop the same within the assured clear distance ahead that he can see. The fact that the said defendant may have done all that a prudent and careful driver could have done to avoid the collision after he discovered the deceased near the middle of the intersection would not relieve the defendant from liability for his negligence prior thereto, if such prior act of negligence was the proximate cause of the injury.

I further instruct you, members of the jury, that the defendant, as he was driving East on Page Avenue, is chargeable with having seen that which was to be seen, and in that connection I instruct you that if he could and should have seen the plaintiff's decedent when the plaintiff's decedent was standing at or near the center of the street and at the time when defendant was at some distance to the West thereof and approaching him, and that if the defendant, as a reasonably prudent person, could or should have observed that there was traffic approaching from the opposite direction, that the defendant should have then

<sup>42</sup> Brown v. Henderson, 285 Mass 192, 189 NE 41.

realized that it might be dangerous for him to continue ahead driving close to the plaintiff's decedent, and if you find that the defendant should have seen and apprehended the situation and possible danger, but failed to take any precaution to avoid possible injury to plaintiff's decedent, when a reasonably prudent person would have taken such precaution, then the failure of defendant to exercise ordinary and reasonable care under such conditions would constitute negligence <sup>43</sup>

(2) I, also, members of the jury want to instruct you that it is a law of the state of Michigan that under present day traffic conditions a pedestrian before crossing the street or highway must first make proper observation as to approaching traffic, second, observe approaching traffic, and form a judgment as to its distance away and its speed; third, continue his or her observation while crossing the street or highway, and fourth, exercise that degree of care and caution which an ordinarily careful and prudent person would exercise under like circumstances

But if a person walks out into a street and passes the center of the street there is no duty at law imposed upon him or her to look in the direction to his left where vehicles might be approaching on the wrong side of the street, he has a right to assume under those circumstances that the vehicles will obey the law and be on the proper side of the street. That request for instruction is requested by the plaintiff in view of the plaintiff's claim that she had crossed the center line of East Main Street and that the defendant was, shall we say cutting the corner too close so he was on his left side of Main Street where he should not have been That is a question of fact for your determination

Furthermore, at the request of the defendant I instruct you as follows If after considering the evidence in this case you find that the plaintiff, Mrs. Day, failed to make proper observation for approaching traffic while crossing the street, then you must find she was guilty of contributory negligence and your verdict will be no cause for action Thus, after considering the facts in this case you determine that the plaintiff before crossing the street failed to observe approaching traffic and form a judgment as to its distance away and its speed, then you must find the plaintiff guilty of contributory negligence and your verdict will be no cause for action If, after considering the facts in this case you determine the plaintiff before crossing the street—while crossing the street failed to continue her observations, then you

<sup>43</sup> Black v. Ambs, 307 Mich 644, judgment for defendant in wrongful death action  
12 NW2d 381, affirming verdict and

must find the plaintiff guilty of contributory negligence and your verdict should be no cause for action Finally, if after considering the facts in this case, you determine the plaintiff while crossing, before and during her crossing of this street failed to exercise that degree of care and exercise under like circumstances, then you must find the plaintiff guilty of contributory negligence and your verdict should be no cause of action <sup>44</sup>

(3) A pedestrian lawfully upon a highway is not required to refrain from crossing such highway whenever a car is in sight and there may be cases where he may properly exercise his judgment upon the question of when he should attempt to cross a highway and it may happen that he has miscalculated the distance that the automobile is away from him or the speed at which it is traveling If such pedestrian was exercising that care and caution that a reasonably prudent person would have exercised in crossing or walking upon such highway under the circumstances and conditions then existing the pedestrian is not necessarily guilty of contributory negligence in so doing, although he may have miscalculated the distance that the automobile was away or the speed at which it was traveling or both  
\* \* \*

I instruct you, if the plaintiff saw or in the exercise of due care should have seen the defendant's approaching automobile by keeping a proper lookout in time to have taken precautions to avoid the automobile striking him by stepping out of the way of the automobile and he failed to keep such lookout you will be warranted in finding that he was guilty of contributory negligence <sup>45</sup>

#### Minnesota

It appears from the evidence in this case that this accident occurred not at a pedestrian crossing but some distance—you will remember the evidence—some distance from such regular crossing for pedestrians The statute says that, under such circumstances, the pedestrians shall yield the right of way to automobiles In other words, that the automobile driver has what is known as the statutory right of way, but that does not mean that he must not still exercise reasonable care with reference to pedestrians Mr H was not necessarily negligent in crossing a street at a place other than a regular intersection He was required to exercise ordinary care in his movements, that is, the same degree of care that an ordinarily prudent person would use under the same circumstances The driver of the

<sup>44</sup> Day v Troyer, 341 Mich 189,  
67 NW2d 74

<sup>45</sup> Hammerbacher v Babechen-  
ko, 348 Mich 139, 82 NW2d 456



automobile was also required to exercise ordinary care in his movements. Neither of them had an absolute right of way. Each owed a duty to the other to exercise reasonable care to avoid injury.<sup>46</sup>

#### Mississippi

The court further instructs the jury for the plaintiffs that, if you believe from the evidence in this case that M K, the driver of the car inflicting the injuries, at the time of and after turning in Main Street to go into and upon Union Street, did not have his car under control so as to avoid striking any person or pedestrian in the street, or crossing the street, at or near the intersection of Union Street with Main Street, or if the jury believe from the evidence that he was not keeping a proper lookout for pedestrians at such time of turning in Main Street to go into Union Street and before reaching the intersection of Union Street with Main Street, who might then be in said street at or near the intersection of Union with Main Street or who might be crossing said Union Street at said intersection, or if the jury believe from the evidence that he did not sound his horn or give a signal so that any pedestrian might be warned of his approach from Main Street into Union Street, who might then be in the act of crossing Union Street at the point of its intersection with Main Street, and if the jury believe that, as a result of his failure, if they believe from the evidence, he did so fail, to keep a proper lookout for pedestrians at said intersection of Union Street with Main Street, or to sound his horn, or to keep his car under control so as to avoid striking anyone or any pedestrian who might then be in the street or crossing the street at the intersection of Union with Main Street, he ran into and against the deceased, Mrs I J S, inflicting upon her injuries from which she died, then, in either of such failures, it is the duty of the jury to find for the plaintiffs and against the defendants, B K, H K, and M K.

The court further instructs the jury for the plaintiffs that, if they believe from the evidence in the case that M K, the driver of the car, when he turned into Main Street to go from Main Street into and upon Union Street, and before he reached the line of intersection where Union Street touches Main Street, and where pedestrians were accustomed to cross Union Street, was so blinded by the lights of an approaching car or any other lights so as to prevent him from seeing any pedestrian crossing Union Street where it intersects Main Street, or from

<sup>46</sup> *Heikkinen v Cashen*, 183 Minn 146, 235 NW 879

seeing the deceased, I J. S., in said street and before striking her, or from seeing her too late to avoid striking her while in said street, then it was the duty of the said driver, M K., to at once have stopped his car, until he could ascertain whether his way was clear or whether any pedestrian was in the street, and in this case the court instructs the jury that, if they believe from the evidence that the said M K. was so blinded by the lights of an approaching car, or any other lights, whereby he was prevented from seeing any pedestrian in the street intersection of Union with Main, before reaching such intersection, and that he failed to stop his car and ascertain whether any pedestrian was crossing Union Street at said intersection, and that, as a result of his failure to stop his car at once upon being blinded, he ran into and against the deceased, I J. S., inflicting upon her injuries from which she died, then it is the duty of the jury to find for the plaintiffs against all the defendants, B K., H K. and M K. <sup>47</sup>

#### Missouri

(1) If you find defendant turned to the right at the intersection, and further find that defendant failed to keep to the right of the center of the intersection, and that such failure, if any, constituted negligence, and as a result thereof plaintiff was hurt, then she may recover <sup>48</sup>

(2) The court instructs the jury that it was plaintiff's duty to exercise ordinary care for her own safety while crossing the street mentioned in the evidence. In this connection, the court further instructs you that if you find and believe from the evidence in this case that plaintiff either saw, or by the exercise of ordinary care could have seen, the defendant's automobile in time thereafter, by the exercise of ordinary care, to have avoided the same, and that plaintiff failed to do so, and that such failure directly caused, or contributed to cause, plaintiff's injuries, then she cannot recover in this case, and your verdict must be for the defendant.

The court instructs the jury that if you find and believe from the evidence in this case that, while crossing Delmar Avenue from the north to the south, if you so find, plaintiff passed in front and in the clear of defendant's automobile, and thereafter plaintiff suddenly turned around and started back to the north directly in front of the automobile mentioned in the evidence, and that at that time the driver of the automobile, by the ex-

<sup>47</sup> B Kullman & Co v Samuels  
148 Miss 871, 114 S 807

<sup>48</sup> Erxleben v Kaster (MoApp),  
21 SW2d 195

ercise of the highest degree of care, was unable to avoid striking plaintiff, then and in that event plaintiff cannot recover in this case, and your verdict must be for defendant <sup>49</sup>

(3) The court instructs the jury that one charge of negligence made by plaintiff against defendant in this case is what is known as the humanitarian doctrine—that is, that the defendant and Mrs W negligently failed to use the means at hand in operating said car to avoid striking deceased, N., after they discovered or by the exercise of reasonable care could have discovered that he was in imminent danger Now, upon this theory of the case you are instructed that the defendant and Mrs W were not required under the law to stop or attempt to stop the car until they saw, or by the exercise of ordinary care could have seen, the deceased, N., was in imminent danger or peril, and then they were only required to use the means at hand to avoid striking him And in this connection you are instructed that if you find and believe from the evidence that the deceased, N, negligently stepped from a place of safety to a place of danger immediately in front of defendant's automobile and at said time defendant and Mrs W were so close on him that they could not avoid striking him, then plaintiff cannot recover and it is your duty to find for the defendant on this theory of the case <sup>50</sup>

#### Montana

(1) At a street crossing a pedestrian need only exercise such reasonable care as the case requires, for he has the right to assume that a driver will also exercise due care and approach the crossing with his vehicle under proper control Both are required to exercise the degree of care that the conditions demand <sup>51</sup>

(2) A pedestrian has the right to cross a public street at any place, but greater caution is required of him if he crosses between crossings prepared for pedestrians than at such crossings, because greater caution is required of automobilists at crossings than between Crossings are prepared especially for pedestrians, and automobilists must bear this in mind and be more cautious at such crossings For this reason, more caution is required of a pedestrian when crossing between rather than at crossings Ordinary caution, though, must be observed by drivers and pedestrians both at and between crossings <sup>52</sup>

<sup>49</sup> Taggart v Joseph Maserang  
Drug Co, 223 MoApp 292, 14 SW  
2d 453

<sup>51</sup> McGregor v Weinstein, 70  
Mont 340, 225 P 615

<sup>50</sup> Nickelson v Cowan (MoApp),  
9 SW2d 534

<sup>52</sup> Carey v Guest, 78 Mont 415,  
258 P 236

(3) On the issue of contributory negligence, if any, of the deceased G W H, you are instructed that his negligence, if any, if it was a proximate cause of his injury and death, would be a complete defense to this action by his administrator

You are instructed, however, that any negligent act or omission of the deceased which may have contributed remotely to his injury would not be such defense if it was not the immediate and proximate cause of his injury and death

And in such event of a wrongful act, neglect, omission or default of defendant was the immediate and proximate cause of the injury and death of the deceased which defendant, by the exercise of reasonable care and prudence might have prevented, he is not relieved from liability by the remote neglect or default of deceased, and you should in that event find in favor of the plaintiff and against the defendant on that issue

You are instructed that before attempting to cross the highway, it was the duty of G W H to make reasonable observations to learn the traffic conditions confronting him, to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passage, and to try to make a sensible decision whether it was reasonably safe to attempt the crossing. What observations the said G W. H. should have made for his own safety while crossing the highway, are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect. It did place upon him the continuing duty to exercise ordinary care to avoid an accident

If, from the evidence before you, you find that both the decedent, G W H, and the defendant were guilty of negligence in some particular as charged, and that such negligence, if any, proximately caused or contributed to the death of the said G W H, then the court instructs you as a matter of law that the plaintiff cannot recover in this action, and your verdict must be in favor of the defendant.<sup>53</sup>

#### New Hampshire

It is not necessarily negligence for a pedestrian when crossing a street to postpone careful scrutiny of traffic approaching on his right until the lane occupied by such traffic is reached. Traffic from the left should be carefully considered first. When that lane of traffic is crossed, then traffic from the right should receive primary consideration. One cannot be said to be negli-

<sup>53</sup> Hightower v Alley, 132 Mont 349, 318 P2d 243

gent as a matter of law in giving but cursory attention to traffic approaching on the right while stepping into and crossing the lane occupied by traffic approaching on the left <sup>54</sup>

#### New Jersey

At the time the plaintiff was injured, she was upon a crosswalk if she was within the confines of that portion of the highway which would be embraced within the boundaries of the lines of the sidewalk, if continued across the street

When a pedestrian and an automobile, moving in different directions, approach such a crossing at the same time or in such a manner that, if both continue their respective courses, there is danger of a collision, then the pedestrian is entitled to first use the crossing, and it is the duty of the driver of the automobile to stop or to so reduce speed as to give such pedestrian a reasonable opportunity to pass in safety, and to that end to have such automobile under such control as to enable him to do so <sup>55</sup>

#### New York

(1) If you find from the evidence that the driver's view was obstructed as he approached the intersection of the streets in question, then it was his duty to blow his horn or give warning of his approach <sup>56</sup>

(2) A pedestrian is not at liberty to close his eyes in crossing a city street. His duty is to use his eyes, and thus protect himself from danger. The law does not say how often he must look, or precisely how far, or when or from where. If, for example, he looks as he starts to cross, and the way seems clear, he is not bound as a matter of law to look again. If he has used his eyes, and has miscalculated the danger, he may still be free from fault <sup>57</sup>

(3) The plaintiff must stand or fall upon his own theory of the case. He says he was crossing Fifth Avenue at or near the crosswalk, or where the crosswalk would ordinarily be. The law is not so narrow as to measure to within inches just what space it is that comprises the crosswalk. The law is reasonable. It is broadminded, and any space of 10, 12, or 15 or more feet depending upon the circumstances, that connects the end of the sidewalk on that side of the avenue to the end of the sidewalk on this side, would be called the crosswalk. But when

<sup>54</sup> Feuerstein v Grady, 86 NH 406, 169 A 622

<sup>55</sup> Clarkson v Ley, 106 NJMiscR 380, 148 A 745

<sup>56</sup> Thomson v Gasteiger, 199 App Div 744, 192 NYS 430

<sup>57</sup> Uralsky v Gribbon, 242 App Div 533, 275 NYS 733

you get 35 feet south of the crosswalk or 55 feet south of the crosswalk, or any such distance as that, you are not on the crosswalk. The plaintiff says he was injured at or near the crosswalk. I will say now that, if you find that this accident occurred 55 feet south of the crosswalk, your verdict will be for the defendant

The plaintiff says that he was coming along Fifty-third Street and crossing the avenue about there. Mrs. J says that is about where he was crossing. If he was crossing 55 feet down, that is not at the crossing, and your verdict will be for the defendant.

Now the plaintiff's claim is that the driver of the automobile was negligent. I am going to eliminate anything that was said to have occurred down to 25 or 55 feet south of the crossing, because, if the accident occurred there, your verdict will be for the defendant.

There are the three questions. First, where did the accident occur? And, if it occurred in the middle of the block or 55 feet or such distance away from the crossing, your verdict will be for the defendant.<sup>58</sup>

#### North Carolina

The law requires every person operating an automobile upon a public highway to use that degree of care that a reasonably careful person would use under like or similar circumstances to prevent injury or death to persons on or traveling over, upon or across such highways and any person so operating an automobile when approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway, or a corner in a highway when the operator's view is obstructed, shall slow down and give a timely signal with his bell, horn or other device for signaling, and the failure of any person so operating such motor vehicle so to do is negligence.<sup>59</sup>

#### North Dakota

I charge you that it was the duty of the plaintiff in crossing Main Street at the place where the testimony showed that he was crossing Main Street, to exercise ordinary care to avoid a collision with vehicles and it was his duty to be on the lookout for approaching vehicles and I charge you further that if you find from the evidence that the plaintiff failed to exercise ordinary care to avoid collisions with vehicles at the time he was crossing Main Street and failed to keep the proper lookout for

<sup>58</sup> *Finnegan v. Mayer*, 200 App. Div. 855, 191 NYS 706.

<sup>59</sup> *Goss v. Williams*, 196 NC 213, 145 SE 169.

approaching vehicles, then the plaintiff was guilty of contributory negligence and if you find the said contributory negligence contributed proximately to his injury, even in the slightest degree, then you must find for the defendant for a dismissal of this action

Neither the plaintiff's nor the defendant's right to proceed was absolute. The direction of the traffic device inviting both plaintiff and defendant to proceed did not give either of them a right to proceed, superior to that given the other. In exercising the right to proceed, each was bound to use that degree of care and caution to avoid inflicting or receiving injury which persons of ordinary care and prudence would have used under like circumstances. The plaintiff was under the duty of using reasonable care to avoid placing himself in such a position that others on the street and in the exercise of reasonable care, might be unable to avoid injuring him. On the other hand, the defendant was under the duty constantly to exercise reasonable care and diligence to anticipate the presence of pedestrians and to drive with such speed and to have his automobile under such control and to so operate it as to avoid injuring them while they were in the lawful use of the street in the exercise of reasonable care.<sup>60</sup>

#### Ohio

(1) A statute of Ohio (R C § 4511.48) provides

"Every pedestrian crossing a roadway within a municipality at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all traffic operating lawfully upon the roadway \* \* \*"

Notwithstanding the provisions of this section, every operator of a vehicle, street car or trackless trolley shall exercise due care to avoid colliding with any pedestrian upon any roadway

I charge you, members of the jury, that notwithstanding these statutes or condition of the lights, that both parties were bound at all times to exercise their faculties of sight and hearing as they entered that intersection. The duty rested upon the defendant as he entered the intersection to exercise ordinary care for the safety of the plaintiff, and likewise the law enjoined upon the plaintiff a duty of exercising ordinary care,

<sup>60</sup> Blackstead v Kent, 63 ND 246, 247 NW 607

whatever that might have been under the circumstances, for his own safety, as he proceeded across that intersection. <sup>61</sup>

(2) If you find by a preponderance of the evidence that either the defendant or the plaintiff failed to obey the automatic traffic signal by going against the red light, that would be negligence per se or as a matter of law upon the part of the parties so doing. However, when the go signal changes before a person entering the intersection with such signal has an opportunity to emerge from such intersection, and a person from a cross street has entered such intersection with the go signal in his favor, neither is wrongfully there, and their rights are equal, subject to the qualification that for his own safety and the safety of the others each must regulate his conduct with reference to his own and such other person's ability or lack of ability to stop or deviate from his course. It is not negligence for a person entering a street intersection with the go traffic signal to rely upon all persons from a cross street who are not at that time in the intersection to observe the stop signal as long as it is against them. <sup>62</sup>

(3) Now, it was not only his duty to exercise ordinary care with respect to looking before he left the curb and stepped onto the street but he was required to be in the exercise of ordinary care for his own safety as he continued to cross the street. It is not for me to say just what he was required to do in every state of fact, but it is for me to say to you that he was crossing this street, it was his duty to be in the exercise of ordinary care for his own safety, and, if he failed to exercise ordinary care for his own safety, such failure would be negligence, and, if such negligence existed and was the proximate cause of injury to him, then he would not be entitled to recover a verdict in this case. <sup>63</sup>

(4) You are instructed that it was the duty of plaintiff, Mrs. K, in crossing Third Street to exercise ordinary care in the use of her faculties of sight and hearing in looking and listening for trolley coaches, and if, being in the full possession of both faculties, she failed to see or hear anything, when a prudent person, exercising his eyes and ears with ordinary care,

<sup>61</sup> *Moody v Vickers*, 79 OhApp 218, 72 NE2d 280, affirming verdict and judgment for defendant.

<sup>62</sup> *Martinovich v E R Jones Co*, 135 OhSt 137, 19 NE2d 952.

In the case cited, judgment on verdict for defendant was affirmed. There was no ordinance or statute

requiring the driver to forego entering the intersection until the plaintiff crossed the street after the signal light changed.

<sup>63</sup> *Valentine v Pavilionis*, 27 Oh App 26, 160 NE 737. See also *Misrach v Eppeison*, 32 OhApp 451, 168 NE 230.



would have discovered the trolley coach in close proximity, and she was thereby injured, then, in such event, she cannot recover in this action and your verdict must be for the defendant, the City Railway Company.<sup>64</sup>

**Oregon.**

(1) If you shall find from the evidence that the plaintiff herein was attempting to cross First Street at a point other than the crossing, it became her duty to yield the right of way to the defendant.

If the pedestrian observes vehicles in the street at such distance from the intersection as would lead a reasonable person to believe that she can cross safely before the arrival of such vehicle, she has a right to cross, and if the driver of the vehicle, after the pedestrian has entered the intersection and is engaged in crossing, finds that if he continues his rate of speed and crosses without slackening his speed or without swerving from his course, a collision will result, it is then the duty of the driver of the automobile to have his car under such control that he can slacken his speed, or turn from his course so as to avoid a collision, and if he neglects to do so and a collision occurs as a result thereof, then the driver of such vehicle is liable for damages resulting therefrom, unless you find that the plaintiff was guilty of negligence herself.<sup>65</sup>

(2) A pedestrian about to cross a road, who looks and sees a car approaching, may calculate upon passing in front of it upon the assumption that it will approach at a lawful rate of speed and if he observes no vehicles on the road within a distance which would be covered by vehicles approaching at a lawful speed, he may proceed upon the assumption that all vehicles outside of such distance will not run at an unlawful speed

A person driving an automobile is driving a machine capable of doing great damage if not handled in a careful and prudent manner; therefore, it takes more care on the part of the driver of an automobile to amount to reasonable care in the situation than is required of a pedestrian walking across the highway. While the same degree of care is imposed on both, the automobile driver and the pedestrian, the amount of care may be different for it may be said the driver is bound to exercise a greater amount of care than the pedestrian

<sup>64</sup> Keller v City R C, 53 OLA 417, 84 NE2d 69 (OhApp) [motion to certify overruled in 31710], affirming judgment on verdict for

plaintiff

<sup>65</sup> Brady v Schnitzer, 135 Or 250, 295 P 961

It is the duty of one attempting to cross the highways in this state to use reasonable care to avoid injury, and the degree of care which such person is required to exercise in so doing, is commensurate with the danger attending at the time and place where said person attempts to cross said highway. In this case, in determining whether the decedent, F. K., exercised the degree of care required, you may take into consideration the character of the highway over which he was attempting to cross, the frequency of travel, the familiarity of decedent with said highway and any and all circumstances shown to have existed by the evidence, and if after a consideration of said matters, you find said decedent did not exercise that care which an ordinarily prudent person would have used in the same or similar circumstances in crossing said highway, that he was guilty of some or all of the negligence set forth in the further and separate answer of defendant, and that such negligence upon the part of the decedent, if you find there was negligence upon his part, contributed proximately, even though slightly, to the injury of which plaintiff complains, your verdict must be for defendant <sup>66</sup>

(3) If you find that plaintiff's conduct was that of an ordinarily prudent person in that he did observe and exercise that degree of care and precaution which the circumstances required, and you find that he was in the exercise of that care to which I have called your attention, that he made the proper observations, he had a right to assume, in crossing, that the other parties were in the exercise of ordinary care and that they were driving their car at a lawful rate of speed, he had a right to take into consideration the entire situation and his conduct is to be measured by that of an ordinarily prudent person <sup>67</sup>

(4) I instruct you that if you should find from a preponderance of the evidence that the plaintiff was using a regular pedestrian crossing in a business district, then and in that event, it was the duty of the defendant to look out for and yield the right of way to the plaintiff, and if the defendant under such circumstances failed and neglected so to do, then and in that event he would be guilty of negligence, and if such negligence was the proximate cause of plaintiff's injuries, and the plaintiff himself was free from negligence, then and in that event your verdict must be for the plaintiff. <sup>68</sup>

<sup>66</sup> *Krieger v Doolittle*, 142 Or 77, 12 P2d 1029  
122, 18 P2d 1041

<sup>68</sup> *Maneff v Lamer*, 148 Or 455,

<sup>67</sup> *Vandever v Youngson*, 140 Or 36 P2d 336

(5) A pedestrian need not continually look and listen for automobiles when he is about to cross the public streets lest he be charged with contributory negligence should he collide with one of them. The degree of alertness which he must employ is dependent upon the attendant circumstances. One who is about to cross a street is required to exercise reasonable care for his own safety; he is bound to anticipate that vehicles may be present in the street, and to use reasonable prudence to avoid placing himself in such a position that the operator of an automobile who is himself exercising due care may be unable to avoid injuring him.<sup>69</sup>

(6) You are further instructed that if you should likewise find from all the evidence in the case that plaintiff was about to cross the path the operator of said taxicab intended to take in making such turn or in such proximity thereto that plaintiff would reach the same before he did, and if without some clear indication on defendant's part, plaintiff could not have anticipated that defendant's said cab intended to cross his path, then and in that event it was the duty of the driver of said automobile to reduce his speed, or stop if necessary, in order to allow plaintiff to pass or proceed in advance of said taxicab with safety; and if said driver failed to so do, and by reason thereof plaintiff was injured, then your verdict should be for the plaintiff, provided that plaintiff was not guilty of contributory negligence.<sup>70</sup>

(7) It was her duty to exercise care and use every reasonable precaution to avert apparent accident, and, if you find that she attempted to cross the roadway and in going upon the street or going across it, she did not exercise reasonable care, and that such failure on her part contributed to her injuries, then she cannot recover. That is to say, if it had not been for her negligence, the injury would not have been received, then she would not be entitled to recover, notwithstanding the fact that the defendant was also negligent. If you find from the evidence in this case that the plaintiff did not exercise the amount of care and prudence which an ordinarily prudent person would have used or exercised under the conditions prevailing at that time, and failed to exercise the degree of care for her own safety in walking along said road, or in attempting to cross said road at the time and manner as elucidated by the evidence, which a person possessed of reasonable prudence would have used under the same conditions and circumstances

<sup>69</sup> *Weinstein v. Wheeler*, 135 Or 518, 295 P 196, 296 P 1079

<sup>70</sup> *Collins v. Red Top Cab Co.*, 129 Or 64, 275 P 913

and that such negligence contributed to her injuries, then your verdict must be for the defendant. If you find from the evidence in this case that a person possessed of ordinary prudence would not have attempted, under the same circumstances and conditions, to either walk or attempt to cross that part of the planked roadway in question, set aside for vehicular traffic, and that plaintiff in walking over and along or attempting to cross said roadway, if you find she did attempt to cross it, was guilty of contributory negligence on her part, without which the injury could not have happened, then your verdict must be for the defendants.<sup>71</sup>

(8) It is the duty of the driver of a motor vehicle, in approaching a pedestrian lane, to observe whether pedestrians are crossing, and, if so, to give them an opportunity to pass in safety, and, if necessary for their protection, to check the speed of his car or even to stop and wait until all danger of injuring any pedestrian is passed.<sup>72</sup>

**Pennsylvania.**

(1) Now, the driver of an automobile on our streets has certain duties toward drivers of other automobiles; he has a certain duty toward a pedestrian. A driver who approaches an intersection has the duty to observe what is ahead, with his automobile under complete control so that he can stop on the slightest possible notice. He must not only be keenly observing what is ahead as he approaches, but he also must look, and keep on looking, as he goes through an intersection. A driver must not go through an intersection blindly.

Now, we have an electric light system on most of our street corners downtown in the city of Pittsburgh. We have the red light and the green light and the yellow light, and you are all familiar with those lights. Now, the electric light system in this state at intersections gives only a permissive license to cross an intersection; it is not an absolute right of way. Even though a driver or a pedestrian has a light, that is a green light, in his favor, he must be vigilant and it is his duty to keep on looking as he crosses the street. A pedestrian, or if it is a driver of an automobile, as he drives along the street, it is his duty to keep on looking as he crosses an intersection, or goes through an intersection, even though he does have a green light in his favor. He has no authority to even cross on a green light blindly. He must look, keep on looking, as he crosses. So in this case, even if the plaintiff had the right of

<sup>71</sup> *Houston v Maunula*, 121 Or 552, 255 P 477

<sup>72</sup> *Maneff v Lamer*, 148 Or 455, 36 P2d 336

way in his favor, if he proceeded blindly across Liberty Avenue without looking before he stepped out onto the street, and even if he did look before he stepped out onto the street and he didn't look as he crossed the street and he was struck by an automobile, he would be guilty of contributory negligence <sup>73</sup>

(2) If Mrs. C. committed herself to the crossing substantially ahead of an approaching car, she had the superior right of way, and it was the duty of the defendant to stop in order to give her an opportunity to complete the crossing <sup>74</sup>

(3) Vehicles have the right of way on the portion of the highway set aside for them, but at crossings all drivers, particularly of motor vehicles, must be highly vigilant and maintain such control that, on the shortest possible notice, they can stop their cars so as to prevent danger to pedestrians, on the other hand, between crossings drivers are not held to the same high standard of care, although, of course, they must be constantly on the lookout for the safety of others. Of course, a driver need not stop if he can, with reasonable certainty, pass in front or in the rear of a pedestrian. By thus diverting the movement of his car, at a public crossing, he is under a definite duty of having it under control. If an accident cannot be avoided without stopping, he must stop his car. A driver is not per se negligent when he deflects his machine to pass around a pedestrian in the act of crossing the street at a public crossing, and he cannot, in the exercise of due care, be charged with negligence in not anticipating the unexpected thing to happen. It naturally follows that he must anticipate the expected thing to happen. An illustration of the former would be the negligent act of a person of mature mind, of the latter, the negligent act of a child <sup>75</sup>

#### South Carolina.

I charge you that it is the duty of the driver of a motor vehicle to sound his horn in order that a pedestrian, if the pedestrian is unaware of his approach, may have timely warning. If it appears that the pedestrian is oblivious for the moment of the nearness of the car and of the speed at which it is approaching, ordinary care requires him to blow his horn, slow down and, if necessary, stop to avoid inflicting injury. I charge you that, Mr. Foreman and gentlemen of the jury, but in connection with that and the rest of my charge, I charge you

<sup>73</sup> Poulos v Cassara, 383 Pa 216, 118 A2d 130 v Rinehart, 243 Pa 231, 89 A 967

<sup>74</sup> Clarke v Hughes, 108 PaSuper Ct 586, 165 A 532 See also Lorah <sup>75</sup> Silberstein v Showell, Fryer & Co, 267 Pa 298, 109 A 701.

that there are reciprocal duties resting upon those who use the highways. The driver of the motor vehicle or the pedestrian on the highway, each must exercise due care, the care that an ordinarily prudent person would exercise while using your highways.

I charge you that the defendant driver of this motor vehicle is not required to anticipate that the plaintiff, seen in a place of safety, will leave it and get in the danger zone until some demonstration or movement on the part of the plaintiff reasonably indicates that fact. He must give warning to one on the highway or in close proximity, if that person is apparently oblivious of the approach of the car, or one whom the driver in the exercise of ordinary care must reasonably anticipate will come into his way.<sup>76</sup>

#### Texas

The law does not prescribe what particular acts on the part of a person attempting to cross a street at or near its intersection with another shall constitute a proper lookout. What shall constitute such lookout must be determined from all the facts and circumstances existing at the time of such attempted crossing. A proper lookout in such case is therefore such as would be kept under the circumstances existing at the time by a person of ordinary care and prudence in entering and crossing such street to discover the approach of vehicles in time to avoid being struck thereby.<sup>77</sup>

#### Vermont

At regular crossings where pedestrians usually cross, the driver of a motor vehicle is required to be more vigilant in keeping a lookout for pedestrians than at points between crossings, and, at points where the vigilance of the driver is somewhat relaxed, the vigilance and watchfulness required of the pedestrian are correspondingly increased. This is due care under the circumstances.<sup>78</sup>

#### Virginia

(1) The court instructs the jury that if you find from the evidence that A B, the deceased pedestrian, started across Washington Street at the intersection of Wilkes Street before the car of the defendant, P A S, reached the intersection of Washington and Wilkes Street, and then you are instructed that she, A B, pedestrian, had the right of way over the car driven

<sup>76</sup> *Durant v Stuckey*, 221 SC 342, App), 47 SW2d 622  
70 SE2d 473

<sup>78</sup> *Howley v Kantor*, 105 Vt 128,  
163 A 628

<sup>77</sup> *Psimenos v Huntley* (TexCiv

by the defendant, and it was the duty of the driver of the car to either change her course, slow down, or come to a complete stop if necessary to permit the pedestrian to safely and expeditiously make the crossing, and if you find that on the occasion in question, the pedestrian was exercising due care for her own safety and that the driver of the car disregarded her duty as above set out, and that the same was the proximate cause of the pedestrian's injury and death, you must find for the plaintiff <sup>79</sup>

(2) The court instructs the jury that if they find from the evidence that plaintiff started across the intersection when the traffic light was red for south-bound traffic and before the automobile of the defendant reached the intersection, and the light changed from red to green while the plaintiff was crossing, they are instructed that he had the right of way over the said automobile, and it was the duty of the driver of the same to either change his course, slow down, or come to a complete stop, if necessary, to permit the plaintiff to safely and expeditiously make the crossing and if they find that on the occasion in question the plaintiff was exercising due care for his own safety and that the driver of the defendant's automobile disregarded his duty as above set out, and that the same was the proximate cause of the plaintiff's injury, they must find for the plaintiff <sup>80</sup>

(3) If you believe from the evidence that the defendant had the green light and that the plaintiff stepped off the island into the path of the defendant's car in close and dangerous proximity thereto and his action in that regard proximately contributed to the accident, then you should find for the defendant That is true even if you believe that the defendant was also negligent <sup>81</sup>

(4) The court instructs the jury that a person lawfully on a public street may rely on the exercise of reasonable care by the drivers of automobiles and trucks to avoid injury, until the contrary appears or in the exercise of ordinary care should appear, and that the plaintiff, I F C, in attempting to and in crossing Boush Street was not required as a matter of law to look or listen continuously for the approach of automobiles thereon, but she is under the duty of using reasonable care for her own safety under all circumstances, and if the jury believe from the evidence that the defendant was operating his truck

<sup>79</sup> Marshall v Shaw, 196 Va 678, 460, 100 SE2d 749  
85 SE2d 223  
<sup>80</sup> Arney v Bogstad, 199 Va 100 SE2d 745  
<sup>81</sup> Bogstad v Hope, 199 Va 453,

on said street in a careless and negligent manner, and that the direct and proximate cause of the plaintiff's injury was such careless and negligent conduct on the defendant's part, and that the plaintiff was not guilty of negligence contributing to her injury, then the jury shall find for the plaintiff <sup>82</sup>

**Washington**

(1) A pedestrian entering a street intersection under the direction of a traffic officer or in obedience to a traffic signal has the right of way and it continues until he reaches the other side of the street, and the fact that the signal has changed, giving traffic in the other direction notice to proceed, does not give them the right of way over the pedestrian first entering the street crossing, and the one first entering has the right to presume that he can pass over in safety, and is not required to exercise continuous and extra observation to avoid vehicles using the street. <sup>83</sup>

(2) The plaintiff had the right to assume that defendant's automobile would approach said crossing at a lawful rate of speed, and that defendant in operating his said automobile would recognize plaintiff's superior right at the crossing and avoid running into him though it might necessitate a change of the course of said automobile or the actual stopping of same <sup>84</sup>

(3) I charge you that it is the duty of a person operating a motor vehicle, on approaching the intersecting street, and also in traversing the intersecting street, to have said motor vehicle under control and operated at such speed as is reasonable and proper, having regard to the use of the street by others, including pedestrians. If you find that defendant, upon the night in question, while proceeding along Broadway in a motor vehicle and approaching North Fourth Street, did not have his motor vehicle under control, and did not operate it at such speed as was reasonable and proper, having regard to the use of the street by others, including plaintiff, then said defendant violated the law, and would be, in law, deemed to be negligent. <sup>85</sup>

(4) While a driver of an automobile across intersections where there are no traffic signals is charged with notice that a pedestrian has the right of way, and is required to observe reasonable care to accord such to the pedestrians, yet as between intersections the automobile has the right of way and

<sup>82</sup> Lucas v Craft, 161 Va 228, 170 SE 836

<sup>83</sup> Ballard v Yellow Cab Co, 20 Wash 67, 145 P2d 1019

<sup>84</sup> Child v Hill, 155 Wash 133, 233 P 1076

<sup>85</sup> Hiteshue v Robinson, 170 Wash 272, 16 P2d 610



the driver has a right to assume that pedestrians will observe this rule. He is not required to anticipate that a pedestrian will step from the sidewalk and attempt to cross a street between intersections, and a mere failure to anticipate such act upon the part of a pedestrian would not be negligence in a driver unless the driver saw, or in the exercise of reasonable caution should see, a pedestrian attempting to cross between intersections in time to avoid a collision.<sup>86</sup>

(5) You are instructed that if you find the accident which resulted in the death of H J S. occurred at a time and place on a public street of the city of Bellingham where the automobile had the right of way over the pedestrian, the driver of the automobile at such time and place had the superior right to proceed and also the right in the absence of knowledge or notice to the contrary, to assume that the pedestrian attempting to cross the street in front of him at such time would yield to him the right of way. A failure to yield the right of way where it is given by law is *prima facie* negligence, and if, as the proximate result of the failure to yield such right of way an accident occurs and the person not having the right of way is injured, such person cannot recover damages on account of such accident.<sup>87</sup>

(6) You are instructed, members of the jury, that the city ordinance in effect at the time this accident happened, provided that on public streets at intersections pedestrians shall not cross said intersections diagonally, and if you find from the evidence in this case that the plaintiff at the time this accident occurred was crossing the intersection of Atlantic Street and Twelfth Avenue South in a diagonal direction, then I instruct you that she was guilty of negligence; and if you further find that her action in crossing said intersection diagonally caused or contributed to cause her injury, then she cannot recover and your verdict must be for the defendant.<sup>88</sup>

(7) If you should find from the evidence that the plaintiff, immediately before he started to cross the street, failed to look north to observe whether there were approaching vehicles, and if you should find that such failure to look north amounted to negligence, that is, it was a failure to exercise ordinary care on his part, yet, if you further find that he had reached a place on the street where, if the defendant had operated its truck in accordance with the provisions of the city ordinance, he would

<sup>86</sup> Libbee v Handy, 163 Wash 466, 298 P 690  
410 1 P2d 312

<sup>87</sup> Settles v Johnson, 162 Wash Wash 198, 244 P 253

<sup>88</sup> Fennel v Yellow Cab Co, 138

have been out of the danger zone, then his failure to look north at the time when he started to cross the street would not preclude a recovery, because of his right to rely upon the use of the street by the defendant in a lawful manner, and of his right to expect the truck to be at a place where under the ordinance it had a right to be <sup>89</sup>

#### Wisconsin

(1) You are instructed that a pedestrian, after making observation and ascertaining that there were no automobiles or other vehicles in his vicinity or dangerously near, may proceed to cross a city thoroughfare.

If at the time a pedestrian leaves the curb, he observes the street is clear and that there are no vehicles on the street for a distance greater than that which would be covered by a vehicle operating at a lawful rate of speed in order to reach the pedestrian's line of operation, he may proceed on the assumption that all vehicles not within such distance will be operated at a lawful rate of speed. <sup>90</sup>

(2) A pedestrian desiring to cross a highway in advance of an approaching automobile has the right of way, if calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced he has sufficient time, proceeding reasonably, to clear the point of intersection of his line of travel with that of the approaching automobile without interfering with the movement of the automobile to pass the point of intersection, and in so doing he has the right to assume that the automobile is approaching at a reasonable and lawful rate of speed <sup>91</sup>

#### § 416. — Walking along street or highway.

##### Alabama

(1) The court charges the jury that the defendant had a right to pass the plaintiff on the left-hand side of the street

The court charges the jury that the defendant was under no duty to assume or anticipate that the plaintiff would step suddenly to the left, immediately in front of or against the automobile

The court charges the jury that, if they believe from the evidence that the defendant blew his horn at a proper dis-

<sup>89</sup> Mosso v E H Stanton Co, 85 Wash 499, 148 P 594

<sup>90</sup> Klokow v Harbaugh, 166 Wis 262, 164 NW 999

<sup>91</sup> Keicher v Michael, 196 Wis 305, 220 NW 179 See also Kroehler v Arntz, 197 Wis 195, 221 NW 727

tance from the plaintiff, and that he would have passed at a safe distance to the left of the plaintiff, at a proper rate of speed, and that the accident was caused solely by the action of the plaintiff in stepping to his left and immediately in front of or against the automobile and too close to avoid striking the plaintiff before stopping or checking the speed of the automobile, and that this action on the part of the plaintiff was the sole proximate cause of the injury, you will find for the defendant <sup>92</sup>

(2) If you are reasonably satisfied from the evidence that the plaintiff stepped from a place of safety into a place of danger in front of the defendant's truck, and after he got into such place of danger and was discovered by the driver of the truck to be in danger, there was not time for the driver of the truck to slacken the speed of the truck or bring it to a stop without inflicting the injuries complained of on the plaintiff or to conserve his safety by turning or warning with his horn, then you can find for the plaintiff under the second count of his complaint. <sup>93</sup>

#### Arizona.

The plaintiff was not required to walk only upon the portion of the highway not used by automobiles, but he had a perfect right to pursue his course along any part of the highway which he saw fit to travel, and it was the duty of the defendant in driving his car at the time of the accident to keep a lookout for any pedestrian or other person or object which might be in the road and to at all times have his automobile under control so that it might be brought to a stop before striking any person whom he might observe in the roadway <sup>94</sup>

#### California

(1) It is the settled law in this state that pedestrians, meaning persons walking upon the highway, have a right to travel anywhere upon the public highway, and it is, therefore, not negligence for them to do so.

Mrs B., as a pedestrian, was under no legal duty to keep a constant lookout back or constantly watch behind her to see whether she was in danger of being struck or run down by any vehicle approaching her from the rear; therefore she was not guilty of negligence or contributory negligence in not doing so, even if the jury find she did not.

<sup>92</sup> Vansandt v Brewer, 209 Ala 224 Ala 688, 141 S 674  
131, 95 S 463

<sup>94</sup> Coe v Hough, 42 Ariz 293, 25

<sup>93</sup> Alabama Produce Co v Smith, P2d 547

A person traveling on foot on a part of the road, and under circumstances where he may reasonably look for vehicles approaching him from in front, but may not contemplate that an automobile will come up behind him, is not under a legal obligation to look back to see whether he is in danger of being struck from behind, and the fact that one does not keep a constant watch behind for an approaching vehicle while walking near the paved portion of the highway, does not show a want of ordinary care on his part, nor constitute negligence per se

A pedestrian is not guilty of contributory negligence, as a matter of law, because of a failure to look behind him and discover an approaching car which may heedlessly run him down.

It was the duty of the driver of defendant's automobile to anticipate that he might meet persons at any point on the highway, and he must, in order to avoid a charge of negligence, keep a proper lookout for them, and keep his automobile under such control as would enable him to avoid a collision with another person using care and caution, and a failure, if any, on his part to use that care was negligence <sup>95</sup>

(2) The defendant B and the plaintiff were both chargeable with only the exercise of reasonable care, but a greater amount of such care was required of the defendant B at the time of the accident in question by reason of the fact that he was driving and operating an automobile which was capable of inflicting death or injury upon others on the highway. <sup>96</sup>

(3) I instruct you that a pedestrian walking along a public highway should keep a lookout ahead for vehicles approaching from in front, but such pedestrian, having no knowledge of an automobile about to approach from behind is not expected to contemplate the approach of any automobile from behind, and under such circumstances would be under no legal duty to look back or watch behind to see whether he or she was in danger of being struck or run down from behind <sup>97</sup>

#### Connecticut

And the plaintiff further claims that he has shown by the same fair preponderance of the evidence that his intestate, E O, was free from any contributory negligence, true, they say she was at the time on the easterly side of this highway;

<sup>95</sup> Burk v Extrafine Bread Bakery, 208 Cal 105, 280 P 522

52, 267 P 724

<sup>96</sup> Vedder v Bireley, 92 CalApp

<sup>97</sup> Idemoto v Scheidecker, 193 Cal 658, 226 P 922

that she had a right to be there, that that was really the zone of safety for all pedestrians going up or down that highway, because on the other side of the highway was the trolley track, and that was utilized by the automobiles, that she was at the time of being struck on the left side of her husband, who was himself on the edge of the concrete pavement

Bear in mind at that point that the trolley track is something higher, that both having stepped off from the concrete onto the dirt to allow the car coming to the north to pass them, they had the right to assume that this car, which they met, would, under the law, keep to the right or westerly side of the highway after passing them, to enable any other car that might meet in their rear to pass them in a lawful manner. With that fact they then had right to assume they were within the zone of safety <sup>98</sup>

#### Indiana

If you find that decedent at the time and place alleged in the complaint, was walking at a place in a roadway where there were neither parallel sidewalks on either side nor a cross-walk for pedestrians from one sidewalk to another on opposite sides of the roadway, then I instruct you that there was no duty to keep a lookout for pedestrians except the duty of exercising reasonable and ordinary care to ascertain the presence of pedestrians in the roadway, and upon discovery of such pedestrians in the roadway to exercise such ordinary and reasonable care as would avoid collision with such pedestrian, if such pedestrian be without fault and in the exercise of due care and caution himself <sup>99</sup>

#### Iowa

A pedestrian equally with the operator of an automobile, has the right to be on and to use the traveled portion of a highway. The statute does not specify any particular part of the traveled way upon which a pedestrian must walk, nor does it specify on which side of him an automobile overtaking him must pass, nor does the state require him to get out of the traveled way for an automobile overtaking him. The pedestrian is required at all times to exercise ordinary care for his own safety. A pedestrian walking along the traveled portion of a highway may assume that the driver of an automobile approaching him from the rear will not violate the law, and will exercise ordinary care in keeping a lookout for him. But this does not ab-

<sup>98</sup> O'Connor v Zavaritis, 95 Conn Court, Marion County, Indiana, No 111, 110 A 878 41939

<sup>99</sup> McGuire v Johnson, Circuit

solve the pedestrian from the duty to keep a reasonable lookout for vehicles approaching from the rear, as well as from the front, and to exercise ordinary care for his own safety. On the contrary such pedestrian must exercise the degree of care for his own safety which an ordinarily careful and prudent man would exercise under like or similar circumstances.

A failure to exercise such ordinary care constitutes negligence and if such negligence, taken together with the negligence of the defendant, is the proximate cause of the injury, then it constitutes contributory negligence, and such pedestrian cannot recover for such injury.

And in this case, before the plaintiff can recover, he must establish by the preponderance of the evidence that the deceased, E. L., was not guilty of contributory negligence.<sup>1</sup>

**Kentucky.**

(1) A person walking on the left-hand side of the road has a right to assume that a bus coming from the rear will not be on the wrong side of the road, and will give him warning of its approach.<sup>2</sup>

(2) The exercise of ordinary care by a pedestrian includes within its scope and meaning the use of the natural senses to discover the approach of automobiles and to avoid being struck when crossing or walking along highways.<sup>3</sup>

(3) It was the duty of the defendant upon approaching the plaintiff in the roadway, public highway, where the accident occurred, to give reasonable warning of the approach of the automobile she was driving and to use every reasonable precaution to insure the safety of the plaintiff, and if you believe from the evidence she failed in any of these particulars, but for such failure the accident would not have occurred, you should find for the plaintiff.

If you believe from the evidence in this case that the plaintiff failed to exercise for her own protection from danger, the degree of care usually exercised by an ordinarily prudent person of her age, intelligence, and discretion, and by such failure, helped to cause and bring about the injuries of which she complains and but for such failure, if any there was, she would not have been injured she would be guilty of contributory negligence and you should find for the defendant.<sup>4</sup>

<sup>1</sup> Kessel v. Hunt, 215 Ia 117, 244 NW 714. See also Collinson v. Custer, 186 Ia 276, 170 NW 420.

<sup>2</sup> Fork Ridge Bus Line v. Matthews, 248 Ky 419, 58 SW2d 615.

<sup>3</sup> Jackson's Admr. v. Rose, 239 Ky 754, 40 SW2d 343.

<sup>4</sup> Deshazer v. Cheatham, 233 Ky 59, 24 SW2d 936.

(4) The truck of the telephone company, not only had the right to use the highway, but had the predominating right of way, P had the same right to use the highway, but his right was not exclusive. It was, however, the duty of the person operating the truck to run it at a reasonable rate of speed, keep a lookout for persons on the highway, or so near in front of it as to be in danger of being struck by the truck or pole, and, if the circumstances warranted it, to give timely warning of its approach, by sounding a horn or other device, to keep the truck under reasonable control and exercise ordinary care to operate it so as to avoid coming into a collision, or causing the spike pole on the truck to come in collision, with P on the highway, or near its edge, and if the operator of the truck failed to perform such duties or any of them, and thereby caused the spike pole to strike P, the S T Co was liable to him for the injury. It was also the duty of P to exercise ordinary care for his own safety and to learn of the approach of the truck and keep out of its way, and if he failed to exercise such care, and his failure, if any, so contributed to cause the spike pole to strike and injure him, for such failure, if any, on his part, he would not have been struck by it in this event, the telephone company was not liable to him, although the jury might believe from the evidence the operator of the truck failed in one or more of his duties, as stated in this instruction. If P, while in a position of safety, saw, or otherwise knew, the truck was approaching him in the rear, and the operator of the truck knew P was present, or in a position to be seen by him, the duty did not rest upon the operator of the truck to sound a warning thereafter.<sup>5</sup>

#### Michigan

It is the claim of the defendant, that the plaintiff, as this truck approached him and was about to pass, walked directly into the side of the truck and that that was a negligent act on his part and would defeat his right of recovery in this case. If the plaintiff negligently walked into the side of this truck, as the defendant's claim he did, as they were passing him, that would be contributory negligence and he would not be entitled to recover.

If plaintiff looked as he says he did and the car was in the range of his vision and you so find, it was his duty to see the car and take precaution for his own safety accordingly. Just where it was when he looked back and saw no approaching car,

<sup>5</sup> Southeastern Tel Co v Payne,  
253 Ky 245, 69 SW2d 358

does not clearly appear from the evidence. But if you find he was in a position where his range of vision as he looked back took in an oncoming car or should have taken in the oncoming car, that fact, if you find it to be a fact, is a circumstance which you are to consider on the subject of plaintiff's contributory negligence, if any. For I instruct you that the law is that a man is in law bound to see what the facts in the case indicate could have been seen if he had looked

It is for you as members of the jury to determine under all of the circumstances of this case, whether the plaintiff was using ordinary care for his own safety as he was walking east-erly on this highway.<sup>6</sup>

#### Missouri

If you find and believe from the evidence that the defendant was driving his automobile south on U. S. Highway No. —, and that the plaintiff was walking on the west half of said road [in the same direction], and that the defendant attempted to pass the plaintiff and drove his automobile toward the east half of the road, and that the plaintiff was not in a position of peril or danger of being struck or collided with by defendant's automobile as it was in the act of passing, and that the plaintiff changed his course and moved toward the center of the road-way, and in so doing came into a position of imminent peril, and that the defendant, by the exercise of the highest degree of care on his part, with the means and appliances at hand, could not, after the plaintiff came into a position of imminent peril of being collided with by said automobile, have avoided striking plaintiff by stopping said automobile, slackening the speed thereof, swerving the course of same, or sounding the signal or warning, then, your verdict should be for the defendant.<sup>7</sup>

<sup>6</sup> *Korstange v. Kroeze*, 261 Mich. 298, 246 NW 127.

<sup>7</sup> *Martin v. Effrein*, 359 Mo. 1150, 225 SW2d 775.

In the case cited, the jury rendered a verdict for the defendant. The trial court granted a new trial on the ground that the instruction set out here, which he had given, "unduly restricts and narrows the zone of peril under the facts and circumstances shown in the evidence." Defendant appealed, and the order granting a new trial was reversed with instructions to reinstate the verdict and render judg-

ment thereon.

While the instruction was approved in view of defendant's evidence it might be noted that it required defendant to exercise the "highest degree" of care after plaintiff came into a position of peril. The courts of some states hold that a defendant is required to exercise only "reasonable care" after discovering plaintiff in a position of peril. Since this instruction was given at the request of the defendant, however, it is assumed that it correctly stated the law in that respect.



### North Dakota

(1) A pedestrian walking along the traveled portion of a highway may assume that the driver of an automobile approaching him from the rear will not violate the law, and will exercise ordinary care in keeping a lookout for him

You are instructed that the driver of an automobile on a public highway has a right to assume that pedestrians traveling on said road will observe due care to discover approaching automobiles and he may rely upon this assumption until he discovers that this is contrary to the actual facts.<sup>8</sup>

(2) You are instructed that a pedestrian, equally with the operator of an automobile, has the right to be on and to use the traveled portion of a highway. The statute does not specify any particular part of the traveled way upon which a pedestrian must walk, nor does it specify on which side of him an automobile overtaking him must pass; nor does the statute require him to get out of the traveled way for an automobile overtaking him. The pedestrian is required at all times to exercise ordinary care for his own safety. A pedestrian walking along the traveled portion of a highway may assume that the driver of an automobile approaching him from the rear will not violate the law, and will exercise ordinary care in keeping a lookout for him. But this does not absolve the pedestrian from the duty to keep a reasonable lookout for vehicles approaching from the rear, as well as from the front, and to exercise ordinary care for his own safety. On the contrary, such pedestrian must exercise the degree of care for his own safety which an ordinarily careful and prudent man would exercise under like or similar circumstances.<sup>9</sup>

### Ohio

The plaintiff was entitled to assume, until such time as she had actually notice or knowledge to the contrary, that operators of automobiles traveling in a southerly direction on U S Route —, including the defendant would operate such automobile in a careful and lawful manner, and action by her in accordance with such assumption was not negligence on her part.<sup>10</sup>

<sup>8</sup> Ignatowitch v McLaughlin, 66 ND 132, 262 NW 352

<sup>9</sup> Ignatowitch v McLaughlin, 66 ND 132, 262 NW 352. In considering this instruction the court said "This instruction was instruction 12, which was construed with approval in the case of Kessel v Hunt, 215 Iowa 117, 244 N W 714 [see the Iowa instruction in this section]

It is a general statement of the law applicable to every pedestrian on the highway, and does not say what the effect of contributory negligence on the part of B I would be in case the jury found he was guilty of contributory negligence."

<sup>10</sup> Smith v Torbett (OhApp), 142 NE2d 868

**Washington.**

You are instructed that, even though you may believe from the evidence that the defendant, A. V. Y., drove her automobile at the time and place in question at a rate of speed faster than that permitted by law, nevertheless, such excessive rate of speed on her part would not justify a verdict for the plaintiff unless you further believe from the evidence that the speed of her automobile was a direct and proximate cause of the injuries and the death of said J. F., if any such occurred.<sup>11</sup>

**Wisconsin**

Pedestrians using those highways not provided with sidewalks are required to travel on and along the left side of such highways and pedestrians, upon meeting vehicles, must, if practicable, step off the traveled roadway.<sup>12</sup>

**§ 417. — On sidewalk.****California**

(1) If you find from the evidence that the defendants observed that people were crowding about said truck and that said truck could not in safety be started, or if the defendants could have observed, by the exercise of ordinary care, that said truck could not be moved in safety because people were crowding about the same, then it was the duty of the defendants not to move or start said truck.

If you find from the evidence in this case that plaintiff, by using ordinary care in proceeding in a northerly direction on the sidewalk on the west side of Broadway, and proceeding around the said truck standing on the sidewalk, and after passing the rear of said truck found himself in a place of danger by reason of crowds of people then attempting to proceed southerly on said sidewalk, and defendants, in operating said truck, observed or could have observed that plaintiff was in a condition of peril, by the use of reasonable precaution or diligence, then it was the duty of defendants to so operate and drive said truck in such a manner as not to injure the plaintiff.

If you find from the evidence that the defendant M., prior to setting his truck in motion, looked to the rear and then saw no one in a position from which an injury would result by reason of the movement of the truck, and if you further find that the general contractors of the building then under construc-

<sup>11</sup> *Flagg v. Vander Yacht*, 174 Wash 521, 24 P2d 1063

<sup>12</sup> *Hanson v. Matas*, 212 Wis 275, 249 NW 505, 93 ALR 546

tion furnished a flagman or flagmen to keep pedestrians clear of the truck while same was departing from the building under construction and control traffic in the street; and if you further find that one of these flagmen signaled the defendant M to drive his truck off the sidewalk; and if you further find that in view of these circumstances, if you find them to exist, and such other circumstances as you may find surrounded the happening of the accident, that the defendant M acted as any other reasonably prudent man would have done under the same or similar circumstances, then I instruct you that the defendant M was not guilty of negligence, and, regardless of all other considerations in the case, your verdict must be in favor of the defendants M and H L Co <sup>13</sup>

(2) It is not a complete defense for the defendant, R F D Co, a corporation, to show merely that the automobile in question was caused to run on the sidewalk by reason of the breaking of some part or portion of the steering gear of its automobile by reason of which the driver lost the power to control the same. It was the duty of the R F D Co to exercise reasonable care in ascertaining whether or not the automobile in question was in reasonably safe condition for its employees to use and if from the evidence in this case you believe that there was a failure upon the part of the R F D Co, a corporation, to exercise this degree of care in maintaining its automobile, and that such failure, if any, proximately contributed to the happening of the accident, then in that event, the defendant R F D Co, a corporation, would be responsible in damages to any person injured thereby <sup>14</sup>

#### Connecticut

The court instructs the jury that you will consider all of the evidence with reference to the opening in the fence through which the defendants' servant was attempting to drive his car, its width, the condition of the ground, and all of the attending circumstances; the condition of the fence, and the possibility of people being upon the sidewalk at the point where she [plaintiff] was attempting to cross, and require of him that degree of care in passing through an opening of that kind that an ordinarily prudent person would exercise under those circumstances. If the elements of danger there were greater than they are or might have been under ordinary circumstances, then you will hold him to that much greater degree of care, to constitute ordinary or reasonable care <sup>15</sup>

<sup>13</sup> Withey v Hammond Lbr Co, Co, 102 CalApp 221, 282 P 1009  
140 CalApp 587, 35 P2d 1080

<sup>15</sup> Walters v Hansen, 99 Conn

<sup>14</sup> Brandes v Rucker-Fuller Desk 680, 122 A 564.

**Iowa**

If you find from the evidence the defendants did not exercise ordinary skill and care in managing the machine, or that the person driving the machine was at the time unable to control it on account of his lack of knowledge or experience, even though you find there were defects in the same by reason of which he was unable to manage the car, nevertheless the driver would not be justified in turning it to the left and upon the sidewalk, where persons were traveling, unless you were satisfied there was a cause for an emergency requiring him to do so, in order to avoid injury. But even then, if you further find they did not have control of the car so that, by reasonable effort and care, they could have prevented the same from running upon the sidewalk where people were passing and repassing, or if you find that by the exercise of reasonable care and diligence and a proper knowledge of the operation of the car they could have stopped the same by the use of the appliances on the car, placed there for that purpose, and they failed to do this, the existence of the alleged emergency will not shield them from the liability for resulting consequences.<sup>16</sup>

**Maine**

Now what were the duties on the part of Mrs. Y. in order that she be in the exercise of due care? She had a right to be upon the sidewalk. She had a right to approach the car and stand anywhere upon the sidewalk. The fact that the car was parked there did not preclude her from occupying any part of the sidewalk or approaching any part of the sidewalk. It was incumbent upon her to take proper precautions and to make proper observations—to take such observations or keep the lookout that the reasonably careful person would, in view of all the circumstances. The fact that the car door was open would call for some caution on her part. If the car were starting or in the immediate operation of starting that would be a notice to her and she would have to observe such precautions as were proper in order not to step in front of the car just as it started. In fact, she is controlled by that same rule of conduct as to ob-

<sup>16</sup> *Carpenter v. Campbell Automobile Co.*, 159 Ia 52, 140 NW 225. The reviewing court in referring to the instruction said: "This instruction, though not happily worded, we think was not misleading or prejudicial and, when properly analyzed and understood, correctly states the law as applicable to this

branch of the case, and, though not worded with the technical niceness that appears in the instruction asked by defendant upon this point, yet we think it more correctly states the rule which should be observed by the jury on this branch of the case, and we find no reversible error in the giving of the same."

serving the car—what a reasonably careful person would observe under the circumstances.<sup>17</sup>

#### Virginia

The court instructs the jury that it was the duty of the defendant, Miss T, while driving her automobile along Broad Street on the day of the alleged accident, to use ordinary care. First, to keep the said car at all times under reasonable control, second, to observe and obey the provisions of such traffic ordinances as the evidence shows were then in force in the city of Richmond, regulating the rate of speed of automobiles, and other like vehicles on Broad Street, and regulating the manner in which parties driving such vehicles and going in the same direction should pass each other.

And if the jury believe from the evidence that the said defendant, Miss T, failed to use ordinary care to perform any one or all of the foregoing duties, and that by reason thereof the car which she was driving left the driveway of said street, and ran partially or wholly upon the sidewalk, and struck and killed the decedent, J F O, while he was either standing or walking on said sidewalk, then the defendant was guilty of negligence, and if the jury further believe from the evidence that such negligence was the proximate cause of the death of the decedent, they must find for the plaintiff.<sup>18</sup>

#### § 418. — Attempting to rescue child from street.

To hold the defendant responsible in damages for any injury plaintiff sustained at that time, it must be shown by the preponderance of the evidence. First, that the child was in danger of being injured by the automobile of the defendant as it was traveling on the street, and that such danger to said child was caused or created by the negligence of the defendant; second, that in making the effort to rescue the child, the plaintiff was not guilty of contributory negligence as that will be defined.

These are the questions of fact which it will be your duty to determine from the evidence. If you find that the child was exposed to peril such as referred to, and that such exposure to peril was caused by the negligent act of the defendant, you will then inquire whether the plaintiff, in attempting to cross the street to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances

<sup>17</sup> Young v Potter, 133 Me 104,  
174 A 387

<sup>18</sup> Trauerman v Olver's Admr,  
125 Va 458, 99 SE 647

as to constitute rashness in the judgment of prudent persons. If the plaintiff believed, and had good cause to believe, that she could save the life of the child without serious injury to herself, the law will not impute to her blame for making the effort <sup>19</sup>

§ 419. — In garage.

The plaintiff may recover in this action upon legal proof of the material averments of his complaint, unless the evidence by a preponderance shows that he was guilty of contributory negligence which proximately and directly caused or contributed to cause his injuries. However, the mere fact of itself that he may have been guilty of negligence would not prevent a recovery by the plaintiff if such negligence did not proximately and directly contribute to cause his injuries. If, therefore, you should find that plaintiff did negligently step into the path of the automobile which struck him, or did not use his senses of sight and hearing as a reasonably prudent person should have done under like circumstances, or was otherwise negligent if shown by the evidence, so that he was then and there in peril and unable to escape from the collision in question because of his said conduct, but if you further find from the evidence that before plaintiff was struck as alleged, the operator of such automobile as employee of the defendant saw and knew of such negligent conduct and peril of plaintiff and saw and knew that plaintiff was unaware of the approach toward him of such automobile and would be struck by and would not be able to escape from the same unless such employee should stop or check the speed of said automobile or otherwise avoid the collision, and then and there such employee with knowledge of the danger in which plaintiff was then and there placed, had sufficient time and opportunity to have so stopped or checked the speed of such automobile and thereby could have avoided striking and colliding with plaintiff, by the exercise of reasonable care if shown by the evidence, but did not so do, and thereby negligently, and carelessly after discovering such facts concerning plaintiff, operated the automobile upon and against plaintiff, causing the collision, then and in such event the court instructs you that the line of causation of any such antecedent negligence on the part of the plaintiff would have been cut off and rendered inoperative as a direct or proximate cause of such injuries by subsequent conduct on the part of said employee; and if under and by reason of such circumstances, you find such facts are established, by the evidence, you should find that plaintiff

<sup>19</sup> Woodward v Gray, 46 OhApp 177, 188 NE 304

was not guilty of any contributory negligence which would prevent him from recovering against the defendant herein <sup>20</sup>

### § 420. Injuries to intoxicated persons.

#### California

If the jury should find that plaintiff was so intoxicated at the time of his injury as to prevent him from using ordinary care for his own protection, and that he did not use such ordinary care, and that his failure so to do contributed directly to his injury, he would not be entitled to recover. <sup>21</sup>

#### Connecticut

The mere fact that the plaintiff was intoxicated, if it was a fact, would not prevent her recovery, but its importance in this case would be that it would strengthen the probability of the defendant's claim that she stepped out in front of his car upon the hardened surface of the highway without making any use of her senses to avoid the danger to which such a position would expose her. <sup>22</sup>

#### Michigan

In determining the question as to whether the plaintiff did exercise due care and caution, you will consider whether he was intoxicated or not, and, if so, whether he was intoxicated to that degree that he could not exercise due care and caution. <sup>23</sup>

#### Ohio.

If you find that the plaintiff was intoxicated at the time of the accident and that the defendant observed such fact prior to the accident, then the defendant owed the plaintiff the duty of using such degree of reasonable care to avoid injuring him as he would have owed to a child or helpless person <sup>24</sup>

#### Oregon.

If you should find from the evidence that plaintiff had intoxicating liquor on her person or was intoxicated at the time she received the injury, that fact alone does not make plaintiff guilty of contributory negligence.

<sup>20</sup> Del-Mar Garage v Boden, 95 IndApp 317, 179 NE 729

<sup>21</sup> Brkljaca v Ross, 60 CalApp 431, 213 P 290

<sup>22</sup> Murphy v Adams, 99 Conn 632, 122 A 398

<sup>23</sup> De Saddler v Yellow Taxicab Co., 216 Mich 45, 184 NW 419

<sup>24</sup> McKinnon v Pettibone, 44 Oh App 147, 184 NE 707, affd 125 Oh St 605, 183 NE 786 The instruction

as given included the words "or should have observed" after the words "and that the defendant observed" This was held to be error, the court saying "Assuming that the plaintiff was entitled to a charge on the last clear chance such charge should not have included the words 'or should have observed'"

I instruct you that intoxication is synonymous with drunkenness, evidenced by undue and abnormal excitations of the passions or feelings or the impairment of the capacity to think and act correctly and efficiently. A person under the influence of liquor is not necessarily intoxicated and cannot be so judged unless his or her mental and physical faculties are impaired.

The mere fact, in itself, that she was intoxicated would not preclude recovery unless such condition was the proximate cause of her injury. Regardless of whether she was intoxicated, her conduct is to be measured by that degree of care which an ordinarily prudent person of like age and experience would have exercised under similar circumstances. In other words, her conduct is to be tested by the degree of care which a prudent person not intoxicated would have exercised.

The care required of a person who has become intoxicated voluntarily is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence.

If you find from the evidence that the plaintiff was intoxicated at the time she was injured, it will also be necessary for you to find that plaintiff failed to exercise the degree of care that an ordinarily prudent sober person would exercise under like or similar circumstances, and that the failure to exercise that degree of care directly contributed to the proximate cause of the injury before you can find plaintiff guilty of contributory negligence.<sup>25</sup>

#### Washington

Defendant claims that at the time of the accident under consideration, the plaintiff was intoxicated. The mere fact of intoxication, if you should find from a preponderance of the evidence that the plaintiff was intoxicated, would not of itself absolve the defendants from liability on their plea of contributory negligence. There must be some negligence on the part of the plaintiff materially contributing to the accident, in order to avoid liability on this plea. An intoxicated person may or may not be negligent, but if you should find from a preponderance of the evidence that the plaintiff was intoxicated at the time of the accident, then that would be a circumstance

<sup>25</sup> Brady v Schnitzer, 135 Or 250,  
295 P 961



for you to consider in determining whether or not she was negligent <sup>26</sup>

### § 421. Injuries to aged or infirm persons.

#### Indiana

It is not negligence for an aged person or one whose hearing is impaired to walk across the streets of this city if in so doing she exercises usual and ordinary care. She is bound to use only ordinary care and it is for you as a jury to consider her age and condition of hearing and all circumstances bearing upon the question in determining whether she took reasonable care in crossing the street at the time of the accident, and under the surrounding circumstances <sup>27</sup>

#### Wisconsin

A public highway is for the use of all persons, including children and the infirm as well as adults and the vigorous. It is a matter of common knowledge that children or infirm persons may be expected to be met with upon the highway, that children may have childish propensities and may from childish impulses and lack of judgment and foresight do many things not to be expected from an adult person, and that aged and infirm persons cannot so readily get out of the way of an approaching automobile

Drivers of automobiles and other vehicles on the highway are required to take into account these facts in regulating their conduct, and they are under obligation, in view of such known facts, to use ordinary care for the safety of children and infirm persons upon the highway as well as other persons, and when driving any vehicle upon a highway where children or infirm persons may be expected to be, they must exercise ordinary care commensurate with the circumstances to seek to avoid injuring any such infirm persons or children <sup>28</sup>

### § 422. Injuries to persons having defective sight.

#### Iowa

The court instructs the jury that if you find that the plaintiff was blind, and that this fact could have been discovered by the defendant by use of ordinary care before the plaintiff was struck by the automobile, then it was the duty of the defendant to stop his car upon discovering such fact, in order to prevent the acci-

<sup>26</sup> Mattson v Cragin, 149 Wash 40854  
638, 272 P 36

<sup>27</sup> Caffery v Summers, Circuit  
Court, Marion County, Indiana, No

<sup>28</sup> Ferge v Schuetz, Circuit Court,  
Marathon County, Wisconsin, see  
195 Wis 662, 217 NW 656

dent, and, if he failed to do so, he would be guilty of such negligence as would make him liable in this action.

The court instructs the jury that a blind person has the same rights on the public streets as any other person, and it is not ordinarily negligence for a blind person to go upon the streets unattended, if such person uses ordinary care as defined in these instructions; but, if you believe from the evidence that the plaintiff was blind, that fact would not excuse him from his obligation to use due care. He was nevertheless bound to exercise that degree of care that an ordinarily prudent person would have exercised under the circumstances as shown by the evidence, and the fact that he was blind not only did not excuse him from the exercise of ordinary care, but required of him the greater use of his other senses to discover, if possible, whether any vehicle was approaching the street over which he was crossing, and, if he failed to exercise such care, he cannot recover; but if you find that he did exercise such care, and he was injured on account of the defendant's negligence, then you should find for the plaintiff.<sup>29</sup>

#### **Oregon**

You are instructed that if you find from the evidence that the defendant in driving her automobile at the time and place alleged in plaintiff's complaint, observed that the plaintiff was blind or in the exercise of reasonable care should have known that the plaintiff was blind, then she was negligent, if under such circumstances she failed to stop.

Those who drive automobiles on the streets of a city, and who observe, or in the exercise of reasonable diligence ought to know, that a pedestrian is blind, must use care commensurate with the danger involved. It will not do to drive on under such circumstances and assume that one thus deprived of sight will jump the right way. The automobile should be stopped.

One deprived of sight need exercise no more than ordinary care in determining whether automobiles are being operated in the street, but due care upon his part requires that he bear in mind his disability and therefore make greater use of his remaining senses in an effort to apprise himself of the use which is being made of the street by others.

The blind and the halt may use the streets without being guilty of negligence if, in so doing, they exercise that

<sup>29</sup> *McLaughlin v. Griffin*, 155 Ia 302, 135 NW 1107

degree of care which an ordinarily prudent person similarly afflicted would exercise under the same circumstances. The true test to be applied to this case is: What would an ordinarily prudent person, who was blind and of the age and experience of the plaintiff do to avoid injury upon hearing the sound of an approaching automobile when crossing the street?

The test of whether a blind person, injured by an automobile while crossing a street, was negligent is: What would an ordinarily prudent person, who was blind and of the age and experience of the plaintiff, do to avoid injury upon hearing the sound of an approaching automobile when crossing the street?

You are further instructed that the blind have equal rights to the use of the streets in the city of Portland, Oregon, as have motorists and other people, but you are instructed that the blind, while using the streets, must exercise such degree of care as is usually and ordinarily exercised by other persons similarly afflicted. Whether or not the plaintiff, J. W., was negligent or careless in going out upon the street at the time of the accident unassisted and without a cane, is for you to say. If you find that J. W. when he went out upon this street at the time of this accident without a cane and unassisted, if you find that this was not the exercise of that degree of care which a prudent person similarly afflicted under like circumstances would have exercised, then J. W. would be negligent, and if this negligence contributed to his injuries, then he cannot recover in this case.<sup>30</sup>

**§ 423. Injuries to persons having defective hearing; noise affecting hearing.**

**California.**

(1) If you find that the noise of the concrete mixer affected appellant's ability to hear the trucks as they were backing up, then I instruct you that the plaintiff was bound to use a greater amount of care for his own safety and protection and to be more vigilant in looking than if his hearing were not so affected.<sup>31</sup>

(2) The plaintiff in the case was bound to use ordinary care for his own safety while riding along the highway, and to observe and take notice of all such dangers as could have been discovered by the observation of a person using ordinary care and caution, and possessed of ordinary sight and hearing,

<sup>30</sup> *Weinstein v. Wheeler*, 135 Or 518, 295 P 196, 296 P 1079

<sup>31</sup> *Warnke v. Griffith Co.*, 133 Cal App 481, 24 P2d 583

provided he had ordinary hearing, and if thereby informed of danger, to avoid it

I instruct you that if you believe from the evidence that defendant B sounded an alarm while approaching plaintiff, and that such alarm would have been heard by a person of ordinary hearing, and that the defendant B believed that plaintiff had ordinary hearing, and that the defendant could not turn to the left and pass plaintiff by reason of the condition of the road, then the defendant had the right to presume that plaintiff would turn to the right upon hearing such alarm and permit defendant to pass, and such right so to presume would exist until it became apparent to the defendant that plaintiff did not hear him <sup>32</sup>

#### Indiana

It is not negligence for an aged person or one whose hearing is impaired to walk across the streets of this city if in so doing she exercises usual and ordinary care. She is bound to use only ordinary care and it is for you as a jury to consider her age and condition of hearing and all circumstances bearing upon the question in determining whether she took reasonable care in crossing the street at the time of the accident, and under the surrounding circumstances <sup>33</sup>

#### § 424. Injuries to children in general. <sup>34</sup>

##### Alabama

If you believe from the evidence in this case that the truck was being run in a proper manner, and that plaintiff's minor son ran suddenly from a place of safety so immediately in front of the automobile truck that the driver of the truck, I. B., could not, by the exercise of all the means at hand, avoid striking him, it is your duty to return a verdict in favor of the defendants.

What would be due care to an adult, would not necessarily be due care to an infant, or, in other words, a person in the streets exercising due care as a reasonably careful and prudent person would exercise, would do one thing when he had to deal, perhaps, with an adult, when to do the same identical thing might be an imprudent thing, or negligence, when dealing with a child of tender years, who was not capable of taking care of himself. So that I say that the test always

<sup>32</sup> Furtado v Bird, 26 CalApp 152, 40854  
146 P 58

<sup>33</sup> Caffery v Summers, Circuit Court, Marion County, Indiana, No

<sup>34</sup> Injuries to child riding bicycle,  
see §§ 441-444

is Did the person or actor, the defendant in this case, use the care of an ordinarily prudent person with reference to the circumstances that confronted him, as for instance in dealing with a child of the same age and discretion and experience as the child in question <sup>35</sup>

#### Arkansas

If you should find from the evidence that the injury complained of was caused or contributed to by the failure of the plaintiff to exercise a degree of care that a child of plaintiff's age and intelligence ordinarily exercised under the same or similar circumstances, and but for which acts the injury complained of would not have occurred, then your verdict should be for the defendant <sup>36</sup>

#### California

(1) A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience There is no precise age at which, as a matter of law, a child comes to be accountable for her acts by the same standard as applies to an adult It is for you to determine the mental capacity and experience of L J C, and whether her conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience, under the same or similar circumstances <sup>37</sup>

(2) I instruct you that in this case, if you find from the evidence that the plaintiff was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable for omitting some precaution or making an unwise choice under this disturbing influence, and I instruct you that if he acted as a reasonably prudent boy of his age would have acted under the circumstances which were then presented to him he is not guilty of contributory negligence, and is not responsible for the accident. <sup>38</sup>

Contributory and imputed negligence generally of child occupant of motor vehicle, see § 412

Injuries to child riding horse, see § 478

Liability of private owner or operator for injury to child occupant, see §§ 481, 482

<sup>35</sup> Southern Exp Co v Roseman, 206 Ala 681, 91 S 612

<sup>36</sup> Murphy v Clayton, 179 Ark

225, 15 SW2d 391

<sup>37</sup> Cole v Ridings, 95 CalApp2d 136, 212 P2d 597

In the case cited, the instruction given here was approved, but judgment for the defendant was reversed for error in the court's charge in other respects

<sup>38</sup> Galwey v Pacific Auto Stages, Inc., 96 CalApp 169, 273 P 866

**Connecticut.**

(1) So far as contributory negligence is concerned, an immature child is expected to use only such judgment and have such experience as children of similar age and experience would have under like circumstances.<sup>39</sup>

(2) A child five years of age is not, and should not be, expected to have much judgment or be able to exercise any substantial degree of care; and therefore I apprehend that you will have little difficulty with the question of contributory negligence in these cases.<sup>40</sup>

(3) The boy cannot be heedless or careless. He is bound to do what he reasonably can to avoid injury, and, in so doing, he is required to see and hear, and use generally his faculties; and if he finds himself in a position where danger is imminent, he is bound to do what he reasonably can to avoid it.<sup>41</sup>

(4) If these children started out from behind the wagon which concealed their presence, so that the driver of the car, having the same under proper control and proceeding at a reasonable rate of speed, could not have avoided striking him, you may say that his conduct was not negligent.<sup>42</sup>

**Georgia.**

The conduct of a child of tender years is not to be judged by the same rule that governs the actions of an adult. Although it is the general rule with regard to an adult that, to entitle him to recover damages for an injury resulting from the negligence of another, he must be himself in the exercise of ordinary care, this is not the rule with regard to an infant of tender years. A child is required to exercise only that care and caution which his age and capacity fit him to exercise, and the question whether he has done this is to be determined in each case by the surrounding circumstances.<sup>43</sup>

**Illinois.**

The court instructs the jury that if they believe from the evidence that the plaintiff's decedent at the time of the accident was a child under the age of seven years, then said child cannot, because of his tender years, be guilty or charged with carelessness or negligence, in respect to the accident in this case.<sup>44</sup>

<sup>39</sup> Kuczon v Tomkiewicz, 100 Conn 560, 124 A 226

<sup>40</sup> Morro v Brockett, 109 Conn 87, 145 A 659

<sup>41</sup> Schroyer v Bishop & Lynes, 92 Conn 677, 104 A 349

<sup>42</sup> Brown v Page, 98 Conn 141, 119 A 44

<sup>43</sup> Huckabee v Grace, 48 GaApp 621, 173 SE 744

<sup>44</sup> O'Connell v Yellow Cab Co, 222 IllApp 118

**Indiana**

(1) The driver of the automobile in this case was not the insurer of the safety of the decedent, whether he was on said automobile as a licensee through permission of the driver or owner of the car, or whether he was there as a trespasser in defiance and over the protest and without the knowledge of such driver or owner. But such driver owed to the decedent in any event, the duty to use reasonable care and caution to prevent injury to said decedent, taking into consideration his immature age and lack of experience and knowledge, from the time said driver knew, or by the exercise of ordinary care should have known, of the presence of said decedent on or about said automobile.

And it is for you to determine from all the evidence in the case, whether H G, the driver of the automobile in question, knew or by exercise of reasonable care should have known of the presence of the deceased on defendant's car at the time in question, and whether after having such knowledge, if he had it, he used such care as a reasonably prudent person would have used under all the existing facts and circumstances, and also whether the decedent contributed to his injury and death by his own negligence taking into consideration the age, lack of knowledge and capacity of such decedent.<sup>45</sup>

(2) In determining whether or not plaintiff is chargeable with contributory negligence in this case, it is necessary for you, under all the evidence introduced in this cause, to decide whether, at the time and place in controversy, the plaintiff exercised such reasonable care as a reasonably prudent child of her age, intelligence, experience and capacity would have been reasonably expected to exercise under the same or like circumstances, and if you find from the evidence that she did not exercise such care, then you will be warranted in finding that she was chargeable with negligence, and if that negligence proximately contributed to the injuries complained of, then she cannot recover, but if you should find from a fair preponderance of all the evidence that she did exercise such care at the time and place in controversy, or if it has not been shown by a fair preponderance of all the evidence that she did not exercise reasonable care as herein defined, then you will be warranted in finding that she was not chargeable with contributory negligence.<sup>46</sup>

<sup>45</sup> Feldman v Greenwald, Circuit Court, Marion County, Indiana, No 36737

<sup>46</sup> Czerwinski v Green, Superior Court, Lake County, Indiana, No 20386

**Iowa**

If you find that H B at said time was about six years of age, then you are instructed that the law presumes that he was incapable of contributory negligence at the time of the accident complained of, and before you would be justified in finding that H B was guilty of contributory negligence at the time of his injury, and in returning a verdict in favor of the defendant because of such negligence on the part of H B, the defendant must establish by a preponderance of the evidence that H. B., just before and at the time of the accident, failed to exercise that degree of care and discretion which children of a similar age ordinarily exercise and use under the same or similar circumstances. If you find from the greater weight of the evidence in this case that H B at the time and place of the accident in controversy, was possessed of the care, discretion and prudence of children of a similar age, and that he failed to use and exercise the same, and that such failure on his part directly helped to cause his injury as a part of the proximate cause or causes thereof, then it would be your duty to find that H. B was guilty of contributory negligence, and in such event your verdict should be for the defendant.

In determining the question of whether H B was guilty of contributory negligence you should take into consideration not only all of the things which he did or failed to do in connection with the accident in question, as shown by the evidence, but you should also give due consideration to his age, experience, maturity or immaturity of his judgment, his education, the condition of his health, his knowledge of the surroundings, together with any other circumstances or facts bearing upon that question, as the same may be shown in the evidence.<sup>47</sup>

**Kansas**

You are further instructed that children of tender age are not held to the same strict accountability as persons of full age and experience, but are required to exercise such prudence and care as persons of their age, experience, knowledge, and intelligence are ordinarily expected to exercise under like circumstances.<sup>48</sup>

**Kentucky**

(1) If you believe from the evidence that the plaintiff appeared suddenly in front of defendant's truck or so near thereto that danger to him should have been anticipated, and that, if defendant had been running at a reasonable rate of

<sup>47</sup> Brekke v Rothermal, 196 Ia 1288, 196 NW 84

<sup>48</sup> Eames v Clark, 104 Kan 65, 177 P 540



speed, he, with the means at his command, in the exercise of ordinary care, could not then have prevented the collision, your finding should be for the defendant <sup>49</sup>

(2) In these instructions the phrase "ordinary care" as applied to defendant's driver means that degree of care usually exercised by an ordinarily careful and prudent person to avoid injury to a child the size and apparent age of C M under circumstances like or similar to those of this case, and as applied to the decedent, C M, means that degree of care usually exercised by ordinarily careful and prudent boys of the age, intelligence, and experience of the said decedent under circumstances alike or similar to those of this case. <sup>50</sup>

#### **Maryland.**

The court instructs the jury that if they find from the evidence that the infant plaintiff was injured as a result of being struck and knocked down by the automobile of the defendant, and if the jury further find that such injury might have been avoided by the exercise of ordinary care and prudence in the management and operation of defendant's automobile, then, unless they find that the injury complained of resulted from want of such care and prudence on the part of the infant plaintiff as ought, under all the circumstances, to have been reasonably expected from one of her age and intelligence, the verdict of the jury must be for the infant plaintiff <sup>51</sup>

#### **Michigan**

(1) If you find from a preponderance of the testimony that the accident was caused because the driver was not looking ahead, and that if he had looked ahead he would have seen the boy and could have stopped the car to have avoided the accident, then the defendant would be liable, it would make no difference in such case whether he was going 10 miles an hour or less, if, by looking, he could have seen the boy, and had plenty of opportunity to have stopped and avoided the accident, he would be guilty of negligence if he failed to look and see the boy.

I have already called your attention to the claim of the defendant that he was driving his car on High Street at the time mentioned in the declaration and was driving the same in a careful and prudent manner, and he also claims that the plaintiff boy ran from the north curb of the street and ran into the automobile driven by the defendant. He also

<sup>49</sup> Golubic v Rasnick, 239 Ky 355, 985 39 SW2d 513

<sup>50</sup> Metts' Admr. v Louisville Gas & Elec Co, 222 Ky 551, 1 SW2d

<sup>51</sup> York Ice Machinery Corp v Sachs, 167 Md 113, 173 A 240

claims that this was a sudden and unexpected act on the part of this child, which he did not anticipate. I charge you as a matter of law that, if this injury and accident was due to the sudden, unanticipated, and unforeseen act of this child, and the defendant did not know or did not have reason to anticipate that this plaintiff was going to run suddenly into his automobile, the plaintiff in this case cannot recover under these circumstances. In other words, the law does not impose any duty on man to guard against sudden, unforeseen, and unanticipated acts of another.<sup>52</sup>

(2) It is the duty of a person operating a motor vehicle upon a public highway to drive his automobile at a speed which is reasonable and proper having regard to the traffic and use of the highway and so as not to endanger the life or limb of any person upon such highway.

If the defendant was guilty of negligence but the accident was also caused by some act not attributable to the defendant, then the plaintiff cannot recover. A person driving upon a highway has a right to assume that others using the highway will obey the law. If the deceased, R. K., ran out from the side of the road and his conduct was such as would not be expected by a reasonably prudent man in the exercise of due care, and the accident was due solely to this sudden unexpected act, the act of R. K. dashing into the street so close to the defendant's automobile that he had no time or opportunity to avoid hitting him, then the defendant would not be liable. One who is confronted with an emergency is not expected to use and exercise the same degree of care that a person would exercise when he has more time to deliberate and when there is no emergency present, but he is bound to use the care that an ordinarily careful and prudent person would exercise under like circumstances. A person operating an automobile is not expected to operate it in such a way as would appear proper to one knowing all the facts and having an opportunity to consider and deliberate upon them, but is expected to operate an automobile only in such a manner as the reasonably prudent man would operate the same under the same circumstances and conditions existing at the time. An accident to the child does not raise the presumption of negligence on the part of a driver of an automobile. If you should find that R. K., plaintiff's intestate, was guilty of contributory negligence, that is, negligence, no matter how slight, for which he is responsible and which contributed to this accident, then your verdict should be no cause of action.<sup>53</sup>

<sup>52</sup> *Werney v. Reid*, 219 Mich 257,  
189 NW 30

<sup>53</sup> *Zylstra v. Graham*, 244 Mich

319, 221 NW 318, *affd* in 246 Mich  
91, 224 NW 343

**Missouri.**

The conduct of a boy 12 years old should not be measured by the standard of care applied to an adult, because the immaturity of youth ordinarily embraces, not only an imperfect knowledge of natural facts and laws and of the proper relation between cause and effect, but, when possessed of those elements necessary to the exercise of reasonable care, it still lacks the discretion, thoughtfulness, and judgment presumed to be an attribute of the ordinarily prudent adult, and which may be said to come only with experience. Thoughtlessness, impulsiveness, and indifference to all but patent and imminent dangers are natural traits of childhood, and must be taken into account when we come to classify the conduct of a child.<sup>54</sup>

**Montana**

The degree of care necessary to be exercised by a child under the law, and by the plaintiff in this case, was the degree of care a reasonable person of his age and understanding would exercise under similar circumstances.<sup>55</sup>

**New York**

(1) After the boy's body lay in the street, in front of the truck, any act or omission on the part of the defendant's servant, amounting to a lack of care demanded by the situation and resulting in the death of the plaintiff's intestate, is sufficient to charge the defendant with negligence.<sup>56</sup>

(2) It was the duty of the decedent to exercise reasonable care to avoid injury. Reasonable care is the care that could fairly be expected of a child of his age, capacity, intelligence, and physical condition. If he had greater natural capacity and intelligence than the average boy of his age, he was bound to use a degree of care proportionately greater. If he failed to use the care required of him, as I have explained it, the defendant is entitled to a verdict.

If the decedent ran into the side of the truck, or if he ran from a place of safety to a place of danger immediately in front of the rear wheel of the truck, there could be no recovery.<sup>57</sup>

**North Carolina**

(1) Children, wherever they go, must be expected to act upon childish instincts and impulses, and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly.

<sup>54</sup> Cervillo v Manhattan Oil Co.,  
226 MoApp 1090, 49 SW2d 183

<sup>55</sup> Pierce v Safeway Stores, Inc.,  
93 Mont 560, 20 P2d 253

<sup>56</sup> Dino v Eastern Glass Co., Inc.,  
231 AppDiv 75, 246 NYS 306

<sup>57</sup> Marius v Motor Delivery Co.,  
146 AppDiv 608, 131 NYS 357

The vigilance and care required of the operator of an automobile vary in respect to persons of different ages and physical conditions. He must increase his exertions in order to avoid danger to children, whom he may see, or by the exercise of reasonable care should see, on or near the highway. More than ordinary care is required in such cases.<sup>58</sup>

(2) It has been frequently declared by the Supreme Court of North Carolina in decisions in a like situation, to be the duty of one operating a motor vehicle on a public street who sees, or by the exercise of due care should see, a child on the traveled portion of the street, or apparently having intention to cross, to use proper care with respect to speed and control of his vehicle, the maintenance of vigilant lookout and the giving of timely warning, to avoid injury to that child, recognizing the likelihood of the child's running across the street in obedience to childish impulses and without circumspection, and the operator is required to exercise a degree of care in keeping with the surrounding conditions and hazards, if any, and the test of liability for negligence is the departure from normal conduct of a reasonably prudent person, or the care which a reasonably prudent person, would employ under the circumstances. Now, that rule is constant, it remains there all the time, while the degree of care which a reasonably prudent person is required to exercise varies with the surrounding conditions at the time.<sup>59</sup>

**Oregon.**

(1) The plaintiff contends that the defendant was negligent, in that he failed to keep a lookout on the highway and to observe and know the presence of said child. I instruct you that it is the duty of the operator of a motor vehicle to at all times keep a lookout in front and to the sides of the motor vehicle which he is driving, so that he can ascertain and know the presence of any substantial object in the anticipated pathway of the motor vehicle. I instruct you that if the defendant in this case failed to keep a vigilant and watchful lookout so as to at all times ascertain the presence of a substantial object in the line of travel of the motor vehicle which he was operating, and that such failure was the proximate cause of the injury to the said child, this would constitute negligence for which the defendant would be responsible.

The plaintiff contends that the defendant was negligent, in that he failed to keep said automobile under control while driving on said turn-around and negligently collided with the

<sup>58</sup> Goss v Williams, 196 NC 213,  
145 SE 169

<sup>59</sup> Barnes v Caulbourne, 240 NC  
721, 83 SE2d 898

said child and operated the vehicle onto and over said child. I further instruct you that a child is a substantial object, and if you find from the evidence that the child was standing on the turn-around or walking on the turn-around, I instruct you that it was the duty of the defendant to have so operated the motor vehicle off the customary line of travel on the highway onto the turn-around in such a manner that the same was at all times under the control of the driver, and in such a manner that he could have observed the presence of said child and avoided him, and that a failure to observe the presence of said child and avoid him, in case you find that such child was standing or walking upon the turn-around immediately before he was struck by the motor vehicle of the defendant, would constitute negligence for which the defendants would be responsible

The plaintiff contends that the defendants were negligent, in that they equipped and operated the motor vehicle which struck and ran over the said child, killing him, with an iron baggage holder protruding some two feet in front of said car, containing keen sharp points and hard iron sides, and in that they failed to equip said vehicle with a bumper or fender protruding in front of said baggage holder. You are to determine, gentlemen of the jury, from all the facts and circumstances, the way the automobile was operated, the purpose for which it was used and intended to be used, as to whether or not a reasonably cautious prudent man would, under all of the circumstances, have equipped and operated a motor vehicle on the public streets and highways as this motor vehicle is alleged to have been equipped and operated; and if you find that a man of ordinary care and prudence would not have operated a motor vehicle so equipped with the iron baggage holder protruding in front of the car and unprotected by a bumper, and if you find such baggage holder on said car was the proximate cause of the injury complained of, then I instruct you that this would constitute negligence on the part of the defendants, and they would be responsible for any injury proximately resulting from such negligence

The plaintiff contends that the defendants carelessly and negligently operated said motor vehicle along the highway and onto the turn-around at a high, dangerous and unlawful rate of speed that endangered the life of the child, and I instruct you that it is the duty of the driver of a motor vehicle to at no time operate his vehicle at a rate of speed which would endanger the life or safety of any person. The law permits the operator of a motor vehicle to operate such vehicle at

certain times at a rate of speed of — miles per hour on the public highways of the state, but you are instructed that the law does not give to the operator of a motor vehicle the right to operate such vehicle at such a rate of speed at all times, but, on the contrary, in case of approaching a dangerous turn, or conditions of the road or highway where pedestrians are apt to be, that it is the duty of the driver of a motor vehicle to operate said vehicle at such a rate of speed that it will not endanger the life or limb of any person. I instruct you that you are the judges of the rate of speed which was or was not unreasonable, taking into consideration the roadway about to be traveled, the darkness of the evening, the conditions of the light, and generally the circumstances surrounding the situation. If you find from the evidence that the defendant, in operating the motor vehicle off of the highway on the turn-around, taking into consideration all of the circumstances, operated the motor vehicle at a rate of speed that was greater than was reasonable under all the circumstances, then I instruct you that this would constitute negligence on the part of the defendant in case you further find it was the proximate cause of the injury of the said child for which the defendant would be responsible.<sup>60</sup>

(2) It is contended in this case that S. J. A., the child in question, was contributorily negligent. I instruct you that a child of the age of S. J. A. is not required or expected to exercise the degree of care or precaution which would be expected from an adult, and by reason of his age, as a matter of law, could not be guilty of contributory negligence, and you are to disregard wholly any allegations or testimony in any manner tending to establish any negligence of any kind on the part of said child, S. J. A.

If you find that S. J. A., without fault or negligence of the defendant, suddenly and unexpectedly appeared on the turn-around immediately in front of the car, I instruct you that his death was an unavoidable accident, and that the rate of speed would be immaterial, for upon such an appearance upon the turn-around, no precaution could have prevented the accident. The defendants cannot fairly or reasonably be charged with negligence in failing to stop their automobile and avoid the accident, unless it appears that the boy entered upon the turn-around at a sufficient distance from the automobile to permit of its being stopped before the collision occurred. If the boy suddenly moved into or upon the turn-around at a place where the driver had no reason to expect him to do so,

<sup>60</sup> Archer v Gage, 126 Or 532, 270 P 521 (four and a half year-old child).

and ran directly in front of or against the automobile, the result could hardly have been other than disastrous, even though the machine had been moving at a very slow rate <sup>61</sup>

#### Pennsylvania

(1) The driver was not compelled at all times to run so slowly that he could stop instantly, but it was his duty to bear in mind that children are apt to run into the street and to keep his machine under control so as to be able to stop in a reasonable time in an emergency, and if he saw the danger in time, he should have so controlled his car as to stop and avoid the accident. <sup>62</sup>

(2) Where an automobile driver sees a child in a place of danger, or has reason to apprehend that it might run into a place of danger, and has sufficient time to stop his car if under proper control, it is his duty to exercise such care as would be reasonably necessary to avoid a collision.

When an automobile driver deflects his car to pass around a little child, he must expect from it (the most natural thing from one of his age) some heedless, thoughtless, capricious act, the negligent act which comes from childish sportiveness, characteristic of an immature mind. Children of this age are not responsible under the law; they know no measure of care.

Where a child is in a place of safety on a sidewalk, or elsewhere, and exhibits no intention to cross the street, nor makes any movement showing such purpose, until the car is so near that it cannot be stopped, and the child suddenly darts in front of it and is injured, the owner of the car is not chargeable with negligence because of the failure of the driver to stop the car. <sup>63</sup>

(3) If you find from the fair weight of the evidence that the plaintiffs' claim is true that the driver of this cab went through there at a high and negligent rate of speed so that he was not able to control his car, and that he saw or should have seen these children, or I should say this boy, and saw or could have seen that the boy was getting into or about or would get into the street in front of him and that he was going at such rate of speed that he could not stop, you would be justified in finding that that was negligence and awarding a verdict for the plaintiffs <sup>64</sup>

<sup>61</sup> Archer v Gage, 126 Or 532, 270 P 521

<sup>62</sup> McMillen v Strathmann, 264 Pa 13, 107 A 332

<sup>63</sup> Silberstein v Showell, Fryer & Co, 267 Pa 298, 109 A 701

<sup>64</sup> Foglia v Pittsburgh Transp Co, 119 PaSuperCt 94, 179 A 871.

**Rhode Island**

If you believe that the accident was caused solely by the child's falling in the snow bank, as testified to by him, and that, having fallen where he himself testified, and the driver had no knowledge that the child had fallen near his truck, and as a reasonable person under the same circumstances by the exercise of ordinary diligence would not have known of the child's predicament, then you will find that the defendant is not guilty, and your verdict must not be for the plaintiff.

If you find that the defendant's truck was being operated at the time and place of the accident at a reasonable and proper rate of speed under the circumstances, and that it was upon the traveled portion of Greene Street, where it had a right to be, and that it was under the control of the driver who was at that time and place operating his automobile (truck) with the same degree of care that the ordinarily prudent person would under the same circumstances, and you find that he is not guilty of any negligence or negligent act, then your verdict must be for the defendant, regardless of whether the child was injured by the wheel of this truck. <sup>65</sup>

**Texas**

You should, in determining the issue of the boy's contributory negligence, if any, consider not only his age and development, but also all other circumstances shown in evidence tending to show his experience or knowledge or familiarity, if any, with the conditions of situations similar to those involved in the case on trial. <sup>66</sup>

**Utah**

The degree of care required of a fourteen-year-old girl is not such as is required of an adult person, but must be determined by a consideration of the care that an ordinary child of her age, intelligence, and experience would be expected to use. <sup>67</sup>

**Virginia**

The driver of an automobile has no right to presume that a child will remain in a place of safety on the side of the road. <sup>68</sup>

**Washington**

(1) A child in the public street is not a trespasser His right there is as sacred as his adult neighbor or the owner

<sup>65</sup> Bourre v Texas Co, 49 RI 364, 17 P2d 224  
142 A 621

<sup>66</sup> Yellow Cab & Baggage Co v Smith (TexCivApp), 30 SW2d 697  
<sup>67</sup> Balle v. Smith, 81 Utah 179,

<sup>68</sup> Price v Burton, 155 Va 229, 154 SE 499 See also U-Run-It Co, Inc v Merryman, 154 Va 467, 153 SE 664.



of the automobile True, he is charged with the duty of exercising such care for his safety as a child of his years, experience, and capacity may fairly be presumed to possess, but the driver of a vehicle of any kind is no less bound to anticipate the presence of children upon the public highway, and to exercise reasonable diligence to avoid injuring them In so doing, he is not justified in assuming that a young child will manifest the judgment and prudence of an experienced man, and must govern his own conduct with some reasonable degree of respect of that fact.<sup>69</sup>

(2) If the jury find that the defendant was proceeding at a rate of speed which was negligent and unlawful, but that the boy suddenly, and without warning, jumped from behind a screening or obstructing automobile into the street and in front of defendant's oncoming auto, in such close proximity and under such circumstances as that the accident would have happened whether the defendant was proceeding at a lawful and careful rate of speed or at an excessive rate of speed, then in such case the rate of speed would not be the proximate cause of the accident, for if the jury should find that the accident was the unavoidable result of the boy jumping suddenly out in front of the oncoming car, and that it would have happened even if the defendant had been proceeding in a cautious and careful manner, then defendant cannot be found liable.<sup>70</sup>

#### West Virginia

The court instructs the jury that the conduct of an infant is not of necessity to be judged by the same rules which govern that of an adult, that while it is the general rule, in regard to an adult or grown person, that to entitle such person to recover damages for an injury resulting from the fault or negligence of another, such person must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to its maturity and capacity wholly, and this is to be determined by the circumstances of the case and the evidence before the jury, and the law presumes that a child between the ages of five and six years cannot be guilty of contributory negligence, and, in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing her maturity and capacity.<sup>71</sup>

<sup>69</sup> Lee v Independent Dairy, 127 Wash 622, 221 P 309 See also Barton v Van Gesen, 91 Wash 94, 157 P 215, Burhe v Stephens, 113 Wash 182, 193 P 684

<sup>70</sup> Von Saxe v Barnett, 125 Wash 639, 217 P 62

<sup>71</sup> McCallam v Hope Natural Gas Co, 93 WVa 426, 117 SE 148

**Wisconsin.**

(1) Children are not held to the same degree of care as are adults. The care required of them is dependent upon their age and experience. E [the plaintiff] is to be held to that degree of care that is ordinarily exercised by children of ordinary care and prudence of her age and experience, and intelligence, and to foresee what a child of her age, experience and intelligence would ordinarily foresee under like circumstances.<sup>72</sup>

(2) You will consider from the evidence whether the minor plaintiff suddenly ran into the street, and if you are satisfied from the evidence that the child suddenly and unexpectedly ran in front of the defendant's automobile at the time when the defendant was driving his automobile in an ordinarily careful manner, in the exercise of ordinary care, under such conditions that he had no reason to anticipate or foresee any such action on the child's part, and when the automobile was only such distance away that it could not, in the exercise of ordinary care, have been stopped by said defendant, or effective warning given before the collision with the child, then in that case the failure of the defendant to anticipate or foresee such action on the part of the child cannot be called negligence or a failure to exercise ordinary care. You are to consider from all the credible evidence in this case whether the defendant was negligent in the manner inquired about.<sup>73</sup>

**§ 425. — Crossing street or highway.<sup>74</sup>****Arkansas**

(1) On the question of the contributory negligence of the plaintiff, you have a right to consider her tender age, and, also, the tendency of children to run across the street near the schoolhouse in going to and from school.<sup>75</sup>

(2) The plaintiff is an eleven-year-old boy. In determining his contributory negligence in attempting to cross a highway in front of an approaching automobile, he should be held to exercise the care and prudence of a boy of that age, and cannot be expected to exercise the same care that an adult should under the same circumstances.<sup>76</sup>

**California**

Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult who

<sup>72</sup> Schmidt v Riess, 186 Wis 574, 203 NW 362.

<sup>73</sup> Kuklinski v Dibelius, 267 Wis 378, 66 NW2d 169.

<sup>74</sup> See also §§ 415, 424, *supra*

<sup>75</sup> Murphy v. Clayton, 179 Ark 225, 15 SW2d 391.

<sup>76</sup> Murphy v Clayton, 179 Ark 225, 15 SW2d 391.

possesses normal physical and mental faculties. A person operating a motor vehicle must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on a person operating a motor vehicle, and from whose conduct injury to a child may result.

The presence of children is in itself a warning requiring exercise of care for their safety. Their conduct is unpredictable and a person operating a motor vehicle should anticipate their thoughtlessness and impulsiveness. A greater degree of care is required of a driver of a vehicle when he knows a small child is at play than in a case where a person of mature discretion is involved.

A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus, it is not negligence for such a person to fail to anticipate an accident which can be occasioned only by a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty.

A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. This latter instruction, given at defendants' request but with certain modifications is recognition of the minor plaintiff's status, reads: "Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him, to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passage, and to try to make a sensible decision whether it is reasonably safe to attempt the crossing. What observations he should make, and what he should do for his own safety, while crossing the street are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect, it does place upon him the continuing duty to exercise ordinary care to avoid an accident, the degree of ordinary care in the case of a minor is that ordinarily exercised by a child of like age, mental capacity and experience, under the same or similar circumstances."

While as to a roadway locality such as that involved in this case, a pedestrian has a right to cross the road at any point, these factors of consideration enter into the question of what conduct is required of him in the exercise of ordinary care. First: If he crosses at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, the law requires him to yield the right of way to all vehicles on the roadway so near as to constitute an immediate hazard. Second: The amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person, in like position, would apprehend in the situation.

This duty to yield the right of way is not an absolute one, and it is for you to determine from the facts, whether the minor plaintiff, A. G., exercised reasonable care under the circumstances, that is, the degree of care ordinarily exercised by a child of like age, mental capacity and experience.<sup>77</sup>

#### Maryland.

The court instructs the jury that under the laws of this state, pedestrians have the right of way at street crossings or intersections not controlled by traffic signals or officers, and if the jury shall find from the evidence in this case that at the time and place of the accident complained of, traffic was not controlled by traffic signals or traffic officers, and that the plaintiff was crossing the intersection of Frederick Avenue and Longwood Street from the south to the north corner thereof at the usual pedestrian crossing, and that the automobile of the defendant was being driven by the defendant's agent and chauffeur in an easterly direction on Frederick Avenue approaching the said intersection or crossing thereof with Longwood Street, and if the jury further find that the defendant's automobile struck and injured the infant plaintiff while she was crossing the said Frederick Avenue at said intersection of Longwood Street, at the usual pedestrian crossing, and if the jury further find that the infant plaintiff was using ordinary care and prudence, and that the failure of the agent and chauffeur of the defendant in operating the defendant's automobile to give the right of way to the infant plaintiff was the sole, direct and proximate cause of the infant plaintiff's injury, then the verdict of the jury must be for the plaintiff.<sup>78</sup>

#### Massachusetts.

If the car was within four or five feet, or was at Oxford Park, when this boy stepped from that curbing, then he was

<sup>77</sup> *Garibaldi v. Borchers Bros.*, 48 Cal2d 283, 309 P2d 23.

<sup>78</sup> *York Ice Machinery Corp. v. Sachs*, 167 Md 113, 173 A 240.

not in the exercise of due care \* \* \* If, looking and not seeing the car at that place, he then walked or ran across that street and was struck by this car, his fault is partly responsible for his injuries, and he cannot recover, and I give that to you as a matter of law.<sup>79</sup>

#### Michigan.

I have already called your attention to the claim of the defendant that he was driving his car on High Street at the time mentioned in the declaration and was driving the same in a careful and prudent manner, and he also claims that the plaintiff boy ran from the north curb of the street and ran into the automobile driven by the defendant. He also claims that this was a sudden and unexpected act on the part of this child, which he did not anticipate. I charge you as a matter of law that, if this injury and accident was due to the sudden, unanticipated, and unforeseen act of this child, and the defendant did not know or did not have reason to anticipate that this plaintiff was going to run suddenly into his automobile, the plaintiff in this case cannot recover under these circumstances. In other words, the law does not impose any duty on man to guard against sudden, unforeseen, and unanticipated acts of another

I charge you that in this case there is no evidence of gross negligence on the part of the defendant.<sup>80</sup>

#### Minnesota.

You are instructed that at the time and place of the accident here involved, G. B. was required to exercise the degree of care which children of the same age ordinarily exercise under the same circumstances, taking into account the age, capacity, and understanding of the child.<sup>81</sup>

#### Missouri

(1) If plaintiff's son was in a position of imminent peril of being struck and defendant saw, or could have seen, him in that position, whether in the street or running toward it, then the duty arose to use all the means at hand to avoid the collision

The court instructs the jury that if you believe and find from the evidence in this case that on the occasion mentioned in evidence, the defendant, C. R. M., was operating his automobile eastwardly along the south side of Cass Avenue, without

<sup>79</sup> Ponticelli v Cataldo, 255 Mass 189 NW 30  
473, 152 NE 81

<sup>81</sup> Borowski v Sargent, 188 Minn 102, 246 NW 540

<sup>80</sup> Werney v Reid, 219 Mich 257,

negligence on his part, and that the plaintiff's son then and there ran into the street immediately to the east of an automobile standing at the south curb, or between said automobile and another automobile standing at said curb, if you so find, and that said standing automobile, in front of which plaintiff's son passed, if you so find, prevented the defendant from seeing plaintiff's son until it was too late for defendant to avoid his injury, then you will find your verdict in favor of the defendant <sup>82</sup>

(2) The court instructs the jury that if you find and believe from the evidence that the defendant negligently and carelessly failed to sound a signal of warning of the approach to plaintiff of the automobile in question, and that said negligence, if any, directly caused the injuries, if any, to plaintiff, then your verdict must be for the plaintiff. <sup>83</sup>

#### North Carolina

You are instructed that, even though the injured party through his own negligence placed himself in a position of peril, he may recover if the one who injured him discovers, or by the exercise of ordinary care could have discovered him in time to have avoided the injury. The defendant would not be relieved of liability by reason of the fact that he did not see him, but the law holds him to the responsibility of seeing what he could have seen by keeping a reasonably vigilant and proper lookout. You are instructed that the mere fact that a child runs in front of a moving motor vehicle so suddenly that the driver had no notice of danger does not necessarily relieve a defendant from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver to avoid the accident after seeing the child, or whether by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury, there being a greater degree of watchfulness and care required of automobile drivers as to children than adults <sup>84</sup>

#### North Dakota.

It has been claimed here by the defendants and in evidence to some extent that the fault was on the part of the little boy who was injured and afterwards died, that it was due to his carelessness and negligence and that it could not be avoided by the defendants. If this be true, then the negligence of the boy would be the negligence of the father, the plaintiff, and if

<sup>82</sup> *Oliver v. Morgan* (Mo), 73 1036, 7 SW2d 398  
SW2d 993

<sup>84</sup> *Goss v. Williams*, 196 NC 213,

<sup>83</sup> *Buck v. Thatcher*, 222 MoApp 145 SE 169.

it was on account of the negligence of the boy who was injured and killed and on account of his fault, and it couldn't have been avoided if the defendant's employee, the defendant G, was driving the truck at that time and at that place in an ordinarily prudent manner, such as an ordinarily prudent person would under all of the circumstances and conditions, then and in that case the plaintiff would not be entitled to recover

I charge you further, that in passing a public school where children are attending, that a person driving a truck or an automobile must keep a vigilant lookout ahead, and need not anticipate that persons will, when he is passing, from the side deliberately run into the highway or street ahead of or onto the truck or automobile that he is driving, but I charge you in this connection that he must have his truck or automobile under such control that if he has reasonable notice of a person appearing suddenly and at a reasonable distance from him, that he can check and control such truck or automobile and avoid an accident or a collision. But I charge you in this case, that it is for the jury to determine under all of the evidence in the case, whether or not the child that was injured, and afterwards died, the child of the plaintiff, was at fault in suddenly appearing or running or walking on the street so close to the truck without notice to the man who was driving the truck that he could not avoid the injury, that if that was the condition at the time and the injury occurred and resulted on account of the fault of the deceased boy, then and in that case, the plaintiff would not be entitled to recover. I charge you, however, as I said before, that in order to determine this, you must take into consideration all the evidence, both that on the part of the plaintiff and that on the part of the defendants, and you should weigh, consider, and compare it all together, and determine upon your verdict after you have done so <sup>85</sup>

#### Oklahoma

If the jury believe from all the facts and circumstances in proof that the driver of defendants' car was operating said car in a careful and prudent manner, having due regard for the safety of others, and plaintiff ran out into the street in front of said automobile in an attempt to cross the street, and that the driver of the car, after the discovery of the peril of plaintiff, used every effort to avoid the injury, but it was impossible for him to do so, then and under such circumstances, the accident would be classed as unavoidable, and under such circumstances plaintiff could not recover <sup>86</sup>

<sup>85</sup> Kalsow v Grob, 61 ND 119,  
237 NW 848

<sup>86</sup> Haskell v Kennedy, 151 Okl 12,  
1 P2d 729

**Pennsylvania.**

Of course, if the boy attempted to run across the street and ran, heedless of what might be coming down upon him, if he stopped on the northern car track, or slowed up in that track, with a view to pulling up his stocking, as the policeman testified, and if he then darted suddenly, so to speak, in the way of S's car, when S had no reason to anticipate that he would attempt to cross its path, I think you would be justified in finding your verdict in favor of the defendant <sup>87</sup>

**Washington**

There is one doctrine under which contributory negligence may not defeat the plaintiff's right of recovery, and that is known as the doctrine of the last clear chance. If, in this case, R was negligently and carelessly rushing across the street and into danger, and if the driver saw him thus negligently rushing into danger, in time, by the exercise of reasonable care, to avoid the accident, and failed to exercise such care when, had he done so, the accident would have been avoided, then, in that case, negligence of the driver and not of the boy would constitute the proximate cause of the accident <sup>88</sup>

**Wisconsin**

In regard to the fifth and seventh questions relating to the negligence of Dorothy B, you will consider whether or not she was negligent as to her own safety. In making answer to those questions you will apply the following definition of negligence. The care required of a child of tender years depends upon his or her age, capacity, discretion, knowledge and experience. Negligence upon the part of a child with respect to his or her own safety is a failure to exercise that degree of care that is ordinarily exercised by a child of the same age, capacity, discretion, knowledge and experience under the same or similar circumstances.

In determining whether or not a child was exercising the care that one of his or her age, capacity, discretion, knowledge and experience would exercise under the same or similar circumstances, due consideration should be given to the child's instincts, for while the child may have the knowledge of an adult respecting dangerous acts, he or she may not have the prudence, discretion, or thoughtfulness to avoid the hazards or risks to which they expose him or her. It is important that you keep in mind the difference between the tests to be applied

<sup>87</sup> Bowman v Stouman, 292 Pa 368, 2 P2d 727. See also Gonnon v Lee, 119 Wash 471, 206 P 2 293, 141 A 41.

<sup>88</sup> Stubbs v Boone, 164 Wash



by you in determining whether the motor vehicle operator, B. R., was negligent, and in determining whether Dorothy B was negligent

Question number 7 inquires as to whether or not Dorothy B was negligent as to her own safety in respect to lookout immediately preceding the collision. In that connection you are instructed that it was her duty as she commenced to cross Monroe Avenue to use such care with respect to lookout for the purpose of ascertaining and becoming timely aware of the presence, location and movement of traffic on that street, as would be ordinarily exercised by a child of the same age, capacity, discretion, knowledge and experience under the same or similar circumstances.

In connection with the fifth question, which inquires as to whether or not Dorothy B was negligent in respect to yielding the right of way to the automobile driven by B. R., I instruct you that every person crossing a street at any point other than a crosswalk shall yield the right of way to vehicles on the street. By "right of way" is meant the right to immediate use of the highway or street.

The fact that a minor child does not know the law of the state I have just stated or understand the meaning of the phrase "yield the right of way" is not conclusive on the question of his or her negligence with respect to failure to yield the right of way. If a child is bright and has been taught by his or her parents of the dangers of crossing streets or highways and understands that he or she should stop or wait to let motor vehicles go by, that is all he or she needs to know in order to be obliged to yield the right of way. In making answer to this question, you will keep in mind the instructions that I have given with respect to the meaning of the word "negligence" as it applies to Dorothy B.<sup>89</sup>

#### § 426. — Walking along street or highway.

##### California

You are instructed that, if you find that the driver of the automobile did not drive with due care and circumspection and at a speed which under all circumstances of the case, was reasonable, and that such unreasonable speed or want of due care and circumspection was a proximate cause of the death of

<sup>89</sup> Brice v Milwaukee Automobile  
Ins. Co., 272 Wis 520, 76 NW2d  
337.

plaintiff's child, it will be your duty to find for the plaintiff, unless there was some negligence on the part of the child, or of the plaintiff himself, which contributed to the injury.

You are instructed that, in determining whether or not the defendant R used due care and circumspection and drove the car at a reasonable and prudent speed, it is your duty to take into consideration all the circumstances which would have influenced the conduct of an ordinarily prudent driver in the same situation, including the relative positions of the children and the truck and trailer, the amount of space which the automobile had in which to pass between them, the apparent age and physical capacity of the children, and whether or not their conduct indicated that they were aware of the approach of the automobile <sup>90</sup>

#### Indiana

If you find that the accident and the resulting injuries were due to the unforeseen act of this plaintiff in suddenly and without warning running into, or into the pathway of, the truck in question, if you find such to be the fact and the truck driver did not know or did not have reason to anticipate that plaintiff was going to run suddenly into his truck or the pathway thereof, then the plaintiff cannot recover under such circumstances. The law does not impose any duty on the driver of an automobile to guard against sudden and unforeseen acts of another, or such as cannot be reasonably anticipated under the conditions then existing. But you must determine from all the evidence in the case whether these conditions or any of them confronted the driver at the time in question. <sup>91</sup>

#### Iowa.

With respect to the question of contributory negligence you are instructed that a child 10 years of age is presumed to be incapable of contributory negligence. It appears from the undisputed evidence that at the time of the happening of the accident in question the said C. J. W. was 10 years of age. The plaintiff has, therefore, made out a prima facie case of freedom from contributory negligence, by the evidence, and you will so find unless the defendant has established facts and circumstances to overcome this prima facie case, or at least to place the evidence on that question in equipoise. Such prima facie case may be rebutted by proof that the said C. J. W. failed to use and exercise the care, discretion, and prudence of children

<sup>90</sup> Metcalf v Romano, 83 CalApp 508, 257 P 114

Marion County, Indiana, No 45116, Instructions 1930-32, p 91

<sup>91</sup> Fleener v Abell, Circuit Court,

of a like age, and that such failure on his part contributed directly to his injury and death. In determining the question of whether C J W was guilty of contributory negligence, you should take into consideration not only all the things which he did and failed to do in connection with the accident in question as shown by the evidence, but you should also give due consideration to his age, experience, maturity or immaturity of his judgment, his education, the condition of his health, his knowledge of the surroundings, together with any other circumstances or facts bearing upon that question as the same may be shown by the evidence.<sup>92</sup>

#### Michigan

(1) If the defendant drove up behind the truck and continued riding up behind the truck, and ran into the boy, coming from behind the boy, then you may consider whether or not defendant was guilty of negligence.

Now I say to you this is the one question for you to determine in this case. How did the boy get under the wheel of the automobile? If the automobile proceeded straight along and ran right into the boy, behind this truck, that would be negligence in driving the car.<sup>93</sup>

(2) If plaintiff looked as he says he did and the car was in the range of his vision and you so find, it was his duty to see the car and take precaution for his own safety accordingly. Just where it was when he looked back and saw no approaching car, does not clearly appear from the evidence. But if you find he was in a position where his range of vision, as he looked back, took in an oncoming car or should have taken in the oncoming car, that fact, if you find it to be a fact, is a circumstance which you are to consider on the subject of plaintiff's contributory negligence, if any. For I instruct you that the law is that a man is in law bound to see what the facts in the case indicate could have been seen if he had looked.

It is for you as members of the jury to determine under all of the circumstances of this case, whether the plaintiff was using ordinary care for his safety as he was walking easterly on this highway.<sup>94</sup>

### § 427. — Playing, skating, or coasting in street or highway.

#### Alabama.

If you believe from the evidence that I B was operating

<sup>92</sup> Webster v Luckow, 219 Ia Mich 238, 189 NW 860  
1048, 258 NW 685

<sup>94</sup> Korstange v Kroeze, 261 Mich

<sup>93</sup> Moreau v Grandmaison, 220 298, 246 NW 127

the truck in a reasonably careful and prudent manner prior to and at the time of the accident complained of, and if you further find from the evidence that N R ran after a marble into the street and in front of the approaching truck, and if you further find from the evidence that said I B did everything in his power in the exercise of reasonable care to avert the accident as soon as N R's peril was discovered, then your verdict must be in favor of the defendants <sup>95</sup>

#### Kentucky.

If you believe from the evidence that the decedent, C. H., came suddenly from behind the sand bin in evidence and in front of defendant's car, and so close in front of it that said Mrs W. could not by the exercise of ordinary care and the use of the means at her command either stop her car or change its course or give said C H warning of her presence by the usual signal in time to have avoided the collision, then the law is for the defendants, Mr and Mrs W, and you should so find <sup>96</sup>

#### Michigan

The test here is not what a reasonably prudent man of mature years would have exercised, but what a reasonably prudent youth of the age of 10 years would have done under like circumstances. In other words, in determining what care T. should have used, it will be necessary for you to keep in mind his age, measuring him by that standard rather than by the standard of a man or woman of mature years. Now upon the question of contributory negligence, this boy, being of the age of 10 years, as I have defined it here at the time of the accident in question—T was then 10 years of age as shown by the testimony, that he was possessed of the intelligence as shown by the evidence bearing upon that question, I further charge you that the law required him in the operation of his scooter and in going upon the highway, coming out in the street with it in the way that he did, that he must make use of his faculties, his hearing, his eyesight when the injury occurred as any ordinarily prudent boy of the age of 10 years and intelligence and experience as shown here by the testimony, and that if he failed to make use of his senses, hearing, eyesight, and has a knowledge of affairs and things as shown by the testimony, if he failed to do so, he is guilty of contributory negligence so he cannot recover, nor can his estate. <sup>97</sup>

<sup>95</sup> Southern Exp Co v Roseman, 241 Ky 279, 43 SW2d 660  
206 Ala 681, 91 S 612

<sup>97</sup> Stehouwer v Lewis, 249 Mich

<sup>96</sup> Hall's Admrx v Greensburg, 76, 227 NW 759, 74 ALR 844

**Oklahoma**

If you find from the evidence that it was the custom of children to play about the parking in the street and cross the street back and forth in going to and from the parking and the driver of defendant's car knew of those habits and customs, it was the duty of said driver to watch out for such children and to keep his car under such control that he could stop without striking such children <sup>98</sup>

**Pennsylvania**

(1) Unless you find that the truck of the defendant was being driven at the time of the accident at an excessive and dangerous rate of speed or that the boy was standing or playing in the roadway a sufficient length of time for the driver to have seen him and stopped, then the verdict must be for the defendant <sup>99</sup>

(2) When children are on the street, playing at a public crossing, plainly visible as the driver approaches, and one of them is in the act of crossing the street, in view of the driver, 50 feet away, his obvious duty, on approaching the crossing, is to bring his car under such control as the circumstances demand. With his car under this control, as he approaches, if he attempts to pass the child in the rear, his car should still be under control, the control that good sense demands, so that, responsive to the child's irrational acts, he can stop the car to avoid injury. He should expect children's impulsive acts. The sudden twisting and turning of the child, caused by the movement of the car, or the noise it made, would not excuse him. <sup>1</sup>

**Washington.**

(1) It was the duty of the plaintiff, while on a public street on roller skates, to use his senses and observe other traffic. If he could see the approach of the automobile and had ample room to pass it, and by the observance of ordinary care on his part might have avoided the injury, then he could not recover <sup>2</sup>

**§ 428. — On private premises.**

The court further instructs you, gentlemen, that if you shall find from a preponderance of all the evidence in the

<sup>98</sup> *Haskell v Kennedy*, 151 Okl 12, 1 P2d 729

<sup>99</sup> *McMillen v Strathmann*, 264 Pa 13, 107 A 332 See also *Edelman v Connell*, 257 Pa 317, 101 A 653

<sup>1</sup> *Silberstein v Showell, Fryer & Co*, 267 Pa 298, 109 A 701

<sup>2</sup> *Burke v Stephens*, 113 Wash 182, 193 P 684 See also *Bulger v Olataka Yamaoka*, 111 Wash 646, 191 P 786

case that the defendant parked his automobile on his slanting or inclined driveway with the intention of leaving it unattended while small children were known by him to be playing around and about it, and especially if the doors were left unlocked so they could get into the car, then it was the defendant's duty to set up his handbrake securely and to do everything also that he could do, by the exercise of ordinary care, to keep the car from rolling down hill. It was also the defendant's duty to see to it and know this handbrake was in good repair at the time he left the car unattended under such circumstances, if he could have known or ascertained the condition of said handbrake by the exercise of ordinary care, and if you shall find from a preponderance of all the evidence in the case that the defendant failed to perform his duty, as above set out, and that such failure was the sole, proximate cause of the accident, then the defendant would be liable in this case and your verdict should be in favor of the plaintiff.

Gentlemen, the court further instructs you, that if you shall find from a preponderance of all the evidence in the case that the handbrake on defendant's car was set up by the defendant under the circumstances heretofore set forth in this charge and that while said handbrake was sufficient to hold the car from running backward down that driveway at the time the brake was set up but that the pawl or safeguard that was intended to fit into the teeth or notches of the brake ratchet, if such teeth or notches themselves were so worn or defective that slight pressure such as a child coming in contact with the brake lever was sufficient to release the car and cause it to run backward down that incline driveway, and if you shall further find that the defendant had knowledge of such defective condition, or that he could have had such knowledge by the exercise of ordinary care, and if you further find that said defect constituted the sole, proximate cause of the injury complained of, then the defendant would be liable in this case.

On the other hand, gentlemen, it was the duty of the plaintiff, who was the father of the little child, to observe ordinary care for the safety of said child, as the law does not require little children five or six years of age to know anything about automobile machinery, nor does the law require of such children any care on their part for their own safety in a case like this, but the law does require the father who had the custody of the little daughter, S. J. E., to exercise ordinary care for her safety.<sup>3</sup>

<sup>3</sup> *Garis v. Eberling*, 18 TennApp 1, 71 SW2d 215

## § 429. — In alley.

**Indiana.**

If you find from the evidence that the plaintiff came into the alley from behind a shed which obstructed the view of the one driving in the alley, and that she so came into the alley suddenly, and so close to the truck that the driver thereof could not see her and that at the time he was driving at a speed that was reasonable and prudent under all the circumstances, and that by the exercise of ordinary care and the use of the means at his command, he could not have stopped his car or changed its course or given warning, and so in the exercise of reasonable care could not have avoided the accident, then you should find for the defendant

To entitle the plaintiff to recover in this action it is necessary that she prove by a fair preponderance of the evidence First, that the defendant drove his automobile through the alley at a speed that was greater than was reasonable or prudent having regard to the width of the highway, the density of the traffic, the use of the highway, and so as to endanger the life and limb of the others or that it was careless, negligent and reckless under the existing circumstances for the defendant to drive his automobile through said alley without slowing down or giving any signal with his horn, bell or other device for signaling, if you find that the truck of the defendant did not slow down or did not give any signal by its horn before the accident occurred, second, if the plaintiff has failed to prove by a fair preponderance of the evidence either one of these facts, she is not entitled to recover in this action or if you find that the injuries to the plaintiff were purely accidental and that the defendant was without fault or that his negligence, if any, was not the proximate cause of plaintiff's injuries, then in either of those events, the plaintiff cannot recover For the plaintiff to recover, it must be shown by a fair preponderance of the evidence that her injuries were caused and brought about by some act of negligence on the part of the defendant which is alleged in the complaint <sup>4</sup>

**Maryland**

Now, there has been some testimony in this case with respect to the signs reading, in effect, "Caution, Children at Play." I don't think the testimony is sufficiently clear to permit you to consider those signs in connection with this accident, because it is not clear, to the court at least, that signs of that nature

<sup>4</sup> *Fleener v Abell*, Circuit Court,  
Marion County, Indiana, No 45116

were at or about the place where the accident happened. On the other hand, a sign of that nature, which we see fairly frequently, mostly in driveways of private residences in the suburbs or in the country, a sign of that nature does not impose any higher degree of care or duty on the part of a driver of a vehicle than the law ordinarily applies to him. In other words, it was the duty of Mr. F, the driver of this truck, to use ordinary care and caution under the circumstances as he found them existing in that alley at or about the time of the happening of the accident.<sup>5</sup>

### § 430. Injuries to persons working in street or highway.

A person who by reason of his occupation is required to work in that portion of the public street traveled by automobiles, in the absence of warning to him, is not required to keep a constant lookout for approaching vehicles.<sup>6</sup>

### § 431. — Examining or repairing automobile.

#### Montana

The driver of an automobile, in case of a breakdown, a collision, or other accident, if he exercises reasonable care, may use the highway for the purpose of inspection, or repair in case his car is unable to proceed, or may render assistance to another on the highway. While the chief use of the highway is travel, these activities constitute a proper use thereof, and the operators of motor vehicles on the highway are bound to exercise reasonable care to avoid injury to persons working on or about vehicles standing on the highway, even though such persons have placed themselves in dangerous positions.<sup>7</sup>

#### Oregon.

A driver who exercises due care may, in an emergency, use a portion of the roadway for making necessary inspections of his car, raising the top, making needed repairs, or for the performance of other acts rendered necessary by the inability of his car to proceed. Such actions, being incidental to travel, are regarded as a proper use of the highway.<sup>8</sup>

#### South Dakota.

The driver of any vehicle overtaking another vehicle proceeding in the same direction, shall pass at a safe distance to the

<sup>5</sup> *Graham v Western Maryland Dairy, Inc.*, 198 Md 210, 81 A2d 457

<sup>6</sup> *Porter v Rasmussen*, 127 Cal App 405, 15 P2d 888

<sup>7</sup> *Fulton v Chouteau County*

*Farmers' Co.*, 98 Mont 48, 37 P2d 1025

<sup>8</sup> *Holman v Uglow*, 137 Or 358, 3 P2d 120



left thereof The court will say to you that under the law the plaintiff had a right to stop his car for the purpose of removing the frost and ice from his windshield, providing, it was in such a condition as to obscure his vision, so that he could not see ahead of him, or to obscure his vision so that it was unsafe to drive While so doing, it was his duty to obstruct the traffic as little as conveniently possible and not unnecessarily to endanger others, and it was his duty at such time to keep a reasonable lookout to avoid injury to himself <sup>9</sup>

**§ 432. — Pushing automobile.**

**Arkansas**

One who, at the express invitation of the operator of an automobile, gets in behind the car to assist in removing it from a ditch is not a volunteer in any sense that would reduce the degree of care of the operator, required to be exercised to prevent injury to him, to less than ordinary care.

You are further told that if you find that the defendant negligently released the brakes, or negligently failed to apply the brakes on the car and thereby permitted it to run back suddenly and injure the plaintiff, your verdict will be in favor of the plaintiff, unless you further find that he himself was guilty of contributory negligence. <sup>10</sup>

**Oregon**

The deceased and his companion had a right to move said car to get the same off said main-traveled portion of said highway so long as they operated the same on the right-hand side thereof where it would have been operated had it been operated under its own power. It was not unlawful for plaintiff's deceased to take a position to the rear of the V car and to assist in pushing the same along the highway upon the right-hand side thereof However, it was incumbent upon him to act as an ordinarily prudent person would have acted under the same or similar circumstances. <sup>11</sup>

**§ 433. — Linemen.**

Plaintiff and defendants in turn assumed the ordinary risks involved in being upon and moving over ground where others were occupied in working and handling or moving objects that might cause injury.

<sup>9</sup> *Griebel v Ruden*, 62 SD 469, 253 NW 447, former opinion, 61 SD 507, 249 NW 810  
<sup>10</sup> *Saliba v Saliba*, 178 Ark 250,

11 SW2d 774, 61 ALR 1348

<sup>11</sup> *Holman v Uglow*, 137 Or 358, 3 P2d 120

While the plaintiff was only required to exercise ordinary care for his own safety and protection, nevertheless the amount of that care which he was required to exercise must be measured by the extent of his exposure to danger. A person who is in a position of danger must exercise care proportionate to the danger, he must be as vigilant and watchful as the danger of his position requires. If he is in a position of constant danger, he must be constantly vigilant and watchful. He must exercise such amount of care which an ordinarily prudent person in a like position of danger would exercise for his own safety and protection. Therefore, if you find that at and immediately prior to the accident, the plaintiff was in a position of danger and that he failed to exercise an amount of care commensurate with such danger, then he was negligent, and if you further find that such negligence proximately caused or contributed to the accident and injuries, he cannot recover and in such event your verdict should be in favor of both defendants.

The defendant M had a right to back his truck over the strip of ground, and such right was equal in every respect to the right of plaintiff to be where he was at the time of the accident. Just as their rights were equal, so also was the duty of each to exercise ordinary care under all the circumstances. Plaintiff could not assume or act or rely upon the assumption that he would not be injured by a truck passing by the place when he was working. He was required to keep such a lookout for such trucks as under similar circumstances an ordinarily prudent person would have kept for his own safety and protection.<sup>12</sup>

#### § 434. — Traffic officers.

A man must exercise his senses of hearing and sight and everything of that kind for his personal safety and protection; but the jury should take into account that "that man, as a traffic officer, had duties to perform there, other than looking after his own personal safety," and that he "had the right to expect that those traveling those streets would take into consideration the fact that he had duties to perform there, and that he could not look after himself as would one who had nothing to do but walk around those streets."<sup>13</sup>

#### § 435. — Street sweepers.

You are further instructed that a street sweeper, or a pedestrian who undertakes to use the street in the line of his employ-

<sup>12</sup> Warnke v Griffith Co., 133 Co., 84 Or 224, 161 P 969, 164 P CalApp 481, 24 P2d 583 736

<sup>13</sup> White v East Side Mill & Lbr

ment where it is frequently used by automobiles or other vehicles, has the right without looking and listening to presume that drivers of automobiles are observing the law, and they will so reduce or gauge their speed and are so conducting themselves so as to meet the obligations which circumstances demand of them at such place <sup>14</sup>

#### § 436. — Using push cart.

A person driving an automobile and a person using or operating a push cart, have an equal right to the use of the public streets of the city.

It is the duty of the driver of the automobile to use reasonable and ordinary care to avoid colliding with and injuring persons who may be in the street. A failure to exercise such care whereby anyone is struck and injured is negligence on his part, which renders him liable to the injured person, such person being himself without fault contributing to his own injury

It is also the duty of a person using or operating a push cart on the public street to use reasonable and ordinary care to avoid being injured, and if by reason of a failure to use such care he is injured, his failure is negligence on his part, and if such negligence proximately contributed to bringing about his own injury, then he is guilty of contributory negligence and cannot recover damages for his injuries <sup>15</sup>

#### § 437. Injuries to persons waiting for, entering, or leaving street and interurban cars.

##### Arkansas

You are instructed that, in determining whether the driver of the truck was negligent, the law is that the driver of a motor vehicle shall not overtake and pass any street car proceeding in the same direction when the said street car is temporarily at rest, when a traversable portion of the highway exists to the right of said street car. <sup>16</sup>

##### California

(1) The defendant was not called upon to drive his car so as to protect passengers on the street car who might see fit to jump from the car while it was in motion, unless and until he had warning that the passenger did intend to jump from the street car while in motion. <sup>17</sup>

<sup>14</sup> *Ferguson v Reynolds*, 52 Utah 583, 176 P 267

<sup>15</sup> *Smith v Hurst & Co*, Circuit Court, Marion County, Indiana, No 32542.

<sup>16</sup> *Pollock v Hamm*, 177 Ark 348, 6 SW2d 541

<sup>17</sup> *Brown v Brashear*, 22 CalApp 135, 138 P 505

(2) It was incumbent upon the driver to foresee the probable presence of pedestrians upon the street, where street cars receive and discharge their passengers, and to bear in mind the weight of his load, the condition of his brakes, and other attendant circumstances <sup>18</sup>

(3) The driver of an automobile must anticipate the presence of pedestrians upon the streets or highways. He must likewise anticipate that passengers will alight at intersections; and it is his duty to operate his vehicle with due care and caution so as to assure the safety of such passengers.

If you find from the preponderance of the evidence that B, after the street car started, proceeded to pass at a lawful speed, and, while he was so doing, plaintiff alighted and stepped in front of the automobile, and that B had no warning of plaintiff's intention and could not stop in time to avoid striking the plaintiff, then your verdict should be for defendant. There was no duty on the part of B to anticipate that passengers would alight from the street car between regular stops <sup>19</sup>

(4) The court instructs the jury that if you believe that the defendant L was in the employ of the defendant S., and was driving his automobile in a southerly direction on Main Street at or near the intersection of Republic Street and that a street car was proceeding in a southerly direction on said Main Street, that the said street car had stopped for the purpose of permitting passengers to alight therefrom, or to board the same, and that the defendant L violated the ordinance of the city of Los Angeles prescribing and directing that the driver of an automobile must stop the same at least 10 feet in the rear of such street car until such passengers, or intended passengers, have boarded said street car, and that the defendant L failed and neglected to so stop said automobile, but proceeded to pass the street car in violation of said ordinance, and that by reason thereof plaintiff sustained injuries, then you should find for plaintiff—if you further find that at that time the plaintiff was in the exercise of reasonable care with regard to her own safety <sup>20</sup>

#### Connecticut

Not only that, but you can not find a verdict against him unless you find, also, that the plaintiff was free from contributory negligence. Now, as I have said, the plaintiff was in her

<sup>18</sup> Morgan v Los Angeles Rock & Gravel Corp., 105 CalApp 224, 287 P 152

<sup>19</sup> Coursault v Schwebel, 118 Cal

App 259, 5 P2d 77

<sup>20</sup> Mann v Scott, 180 Cal 550, 182 P 281

absolute rights in waiting upon the curb there for this trolley; she was within her rights when the trolley came along, in stepping from the curb, and if you find that she did so, she was within her rights in proceeding across the street to that trolley car, but it was incumbent upon her to exercise reasonable care in doing any one of these acts to protect herself from injury.

Now, all of us would agree, and the law is so, that a person standing upon the side of a street, is not exercising reasonable care. The plaintiff says that she did look, and she is corroborated, of course, by some testimony of her sister; her contention is that she did look. Now, if you find that she did look, it is for you to say whether or not, in view of the looking which she did, whether or not, in view of the situation in which she was placed, in view of all the circumstances of the case, she used reasonable care to protect herself from injury. The contention of the defendant, of course, is that she not only failed to look, but that, as he came along close to her situation, she stepped from the curb directly out in front of the car; and the defendant calls attention to the situation when he points out to you what he claims to be a necessary result, that if she had looked she must have seen the car. Now, that contention which the defendant makes in that regard is something for you properly to bear in mind in determining whether or not the plaintiff did look, and whether or not, if she looked at all, she took such proper care as she should have—whether she took reasonable care to protect herself from injury. But, of course, as to her, it is the same as it was with the defendant; she had the right to rely on the defendant using reasonable care until such time as she saw, or ought, in the reasonable use of her faculties, to have seen he was not going to do so.<sup>21</sup>

#### Indiana

The driver of a motor vehicle in a public street has the right to assume that a pedestrian standing in such street will use reasonable and ordinary care to avoid being injured. The driver of such motor vehicle has the right to rely upon this presumption until it becomes apparent that the pedestrian is not exercising such reasonable care, and that by reason thereof, such pedestrian is in a place of danger, from which danger he can not extricate himself without injury, by the use of ordinary care, and whenever such fact becomes apparent, if it does so appear, then the driver of the motor vehicle is required to use reasonable care commensurate with the situation which confronts him.

<sup>21</sup> *Palmer v. Spencer*, 96 Conn 631, 115 A 82

It is the duty of a pedestrian standing in a public street for the purpose of boarding an approaching street car, where vehicles are likely to pass and repass at any time, to keep a reasonable lookout and use such ordinary care to avoid being struck and injured by such vehicles as an ordinarily reasonable and prudent person would do under the same or similar circumstances, and if, while so standing in such public street, such pedestrian fails to use such care as an ordinarily reasonable and prudent person would use under the same or similar circumstances, and, by reason thereof, is struck and injured by a motor vehicle lawfully using said street at said time, whereas such pedestrian could have avoided injury if he had used ordinary and reasonable care to avoid such motor vehicle and avoid being struck thereby, then such pedestrian is guilty of contributory negligence and there can be no recovery on account of such injury

I instruct you that the rights of pedestrians lawfully standing in a public street or highway for the purpose of boarding an approaching street car and those driving motor vehicles in such street or highway are equal in the use of such street or highway, and each is bound to use ordinary and reasonable care. The driver of a motor vehicle is bound to use ordinary care to avoid injury by collision or otherwise to such person lawfully standing in the street, and such pedestrian must use ordinary care and prudence to avoid being injured by coming in contact with objects passing in such street or highway. The degree of care required of a pedestrian lawfully standing in a public street or highway for the purpose of boarding an approaching street car is such care as would be exercised by an ordinarily prudent person under the same or like circumstances and conditions, taking into consideration the nature of the way, the number of people or vehicles, if any, in the street, the character of such vehicles, and all the facts and circumstances of the particular case <sup>22</sup>

Iowa

(1) The signal of the traffic officer, by reason of which the defendant claims to have moved his automobile westwardly across the intersection in question, did not relieve him of the duty of sounding the horn of his machine, or otherwise exercising reasonable care for the safety of persons in the crowd waiting for the street car at the time in question

A person upon the traveled portion of a street is required by the law to make such use of her senses of sight and hear-

<sup>22</sup> Donahue v Radley, Circuit Court, Marion County, Indiana, No 38929

ing, and to take such measures for her safety, and to avoid accidents, as an ordinarily prudent and careful person would take under the same or similar circumstances. A failure to make such use of her senses, or to take such care and precaution, would be sufficient to constitute negligence or want of ordinary care upon her part.

The plaintiff had a right to walk out from the curb to the car track in anticipation of the approaching car at the place in question, and if she took a position in the street near the car track, along with a number of other persons, at the place where the Omaha car customarily stopped, and where passengers for Omaha customarily boarded it, with the intention of boarding the approaching car, she was not absolutely required to keep a lookout for automobiles at that point. She was not entitled to take a position a few feet from the car track and remain oblivious of her surroundings, nor did she have the exclusive right to the street, but she would not be guilty of contributory negligence simply because she did not look and did not see or hear the approaching vehicle <sup>23</sup>

(2) You are instructed that a pedestrian has the same right to use the streets and thoroughfares as an automobile and a pedestrian has the right to cross the street at an intersection at other than right angles. In this case, the plaintiff had the right to walk out from the curb to the street car track in anticipation of the approaching street car at the place in question, and it is for you to determine whether, under all the circumstances, the plaintiff was or was not guilty of contributory negligence in the way and manner in which he proceeded from the curbing towards the street car. Plaintiff was not required to be constantly looking in any one direction nor to follow any set route but was required to use that degree of care and caution that an ordinarily prudent and careful person would use under the same or similar circumstances <sup>24</sup>

#### Maine.

If you find that the defendant at the time of the accident was approaching a regular stopping place of an interurban electric railroad, with an approaching electric car in sight, which car was slowing down to make a stop at its stopping place, it was the duty of the defendant to so control his automobile that he could stop it, and to stop it, if necessary, to avoid injury to passengers alighting from the electric car <sup>25</sup>

<sup>23</sup> Walmer-Roberts v Hennessey, 250 NW 883  
191 Ia 86, 181 NW 798

<sup>25</sup> Rent v Portland Candy Co.,

<sup>24</sup> Minks v Stenberg, 217 Ia 119, 122 Me 25, 118 A 716

**Minnesota**

They both had a right to make use of the streets, and this ordinance is passed for the protection of those who make use of the streets, and where a law is passed for the protection of certain individuals, and where there is a breach of that law or that ordinance, and it is the direct and proximate cause of injury to another party, and a party is injured without contributory negligence, then it becomes negligence per se, that is, liability fixes as against the party who causes the injury.

Negligence, generally speaking, means failure to exercise reasonable care, and reasonable care is that degree of care which an ordinarily careful or prudent person would exercise under like or similar circumstances. I have called your attention to the defendant's claims that the deceased was guilty of contributory negligence in the way he made use of the street at this particular time. They claim that, coming out upon the street as he did, with an umbrella over his head, he did not view the street and did not exercise that degree of care which an ordinarily careful and prudent person would have under like or similar circumstances. Now, contributory negligence is negligence, as I have defined to you, of which the deceased may or may not have been guilty. It is for you to say. The claim of the plaintiff is that the deceased was not guilty of contributory negligence in any sense of the word.<sup>26</sup>

**Missouri.**

(1) The court instructs the jury that if you find from the evidence that on or about March —, 19—, Broadway and Poplar streets were open public streets in St. Louis, and that plaintiff was a passenger on a street car southbound on said Broadway, and that said street car stopped at the intersection of said Broadway and said Poplar streets for the purpose of discharging passengers, and that plaintiff alighted there from said street car, and was proceeding in the street to the west side of Broadway, and that defendant was operating an automobile southwardly along said Broadway, and that it there approached, struck and injured plaintiff, and that while said automobile was approaching plaintiff in the street there, if you so find, the defendant failed to give any warning signal of the approach of said automobile, and that in so failing to give warning, if you so find, the defendant failed to exercise the highest degree of care and was negligent, and that plaintiff was struck and injured as a direct and proximate result thereof, and that plaintiff was at said time in the exercise of ordinary care for her

<sup>26</sup> *Loverage v Carmichael*, 164 Minn 76, 204 NW 921



own safety, then the court instructs you that the plaintiff is entitled to recover and your verdict must be in favor of the plaintiff and against the defendant.<sup>27</sup>

(2) The court instructs the jury that, if you find and believe from the evidence that on the evening of January —, 19—, the plaintiff was intending to board a westbound Wellston street car, and was standing at or about the usual waiting place for persons intending to board westbound Wellston street cars at the junction of Easton, Cass, and Prairie avenues, and if you further find that the defendant was driving an automobile eastwardly on Easton Avenue, and drove same across Prairie Avenue into said junction of Easton, Cass, and Prairie avenues, and that he ran said automobile against the plaintiff and knocked her down and dragged and injured her, and if you further find that the plaintiff was in the path of said automobile, and the defendant, at said time and place, negligently failed to keep a reasonably vigilant watch for persons on the street, and because of such failure, if any, did not see the plaintiff standing in the street and in danger of being struck by said automobile, and that such failure, if any, of defendant to keep a reasonably vigilant watch was the direct cause of defendant running said automobile against plaintiff, then your verdict must be for the plaintiff and against the defendant.<sup>28</sup>

(3) The court instructs the jury that if you believe and find from the evidence that on March —, 19—, at about 7.25 o'clock in the morning, plaintiff had alighted from the rear step of a northbound street car at or near the southeast corner of Twelfth Boulevard and Spruce Street in the city of St Louis, Missouri, and that thereafter plaintiff was walking from the place where she alighted from said street car toward the east sidewalk at said Twelfth Boulevard and Spruce Street, and if you further believe and find from the evidence that the defendant's chauffeur and agent did then and there drive and operate one of defendant's buses northwardly along and upon said Twelfth Boulevard, and toward the place thereof where plaintiff was attempting to cross eastwardly to the east sidewalk; and if you further believe and find from the evidence that the defendant's chauffeur and agent did then and there drive and operate defendant's bus at a rate of speed which then and there was not careful and prudent, and at a rate of speed which endangered the life or limb of plaintiff and at a rate of speed which was then and there dangerous under the circumstances and conditions of the street and traffic as they

<sup>27</sup> *Steinman v Brownfield* (Mo App), 18 SW2d 528

<sup>28</sup> *Welp v Bogy*, 320 Mo 672, 8 SW2d 599

then and there existed, and if you further believe and find from the evidence that, in driving said bus at the aforesaid rate of speed at said place, the defendant's chauffeur and agent was careless and negligent; and if you further believe and find from the evidence that said bus of the defendant did then and there strike, knock down, and injure plaintiff as a direct and proximate result of the negligence and carelessness, if any, on the part of the defendant's chauffeur and agent, if you believe and find from the evidence that the defendant's chauffeur and agent was negligent as aforesaid, then plaintiff is entitled to recover, and your verdict must be for the plaintiff, and against the defendant.<sup>29</sup>

#### New Jersey

If the trolley car had not stopped to take on or discharge passengers, the automobile was being lawfully driven upon the street, to the right of the trolley car

The law did not impose any duty upon the driver of the automobile to bring the automobile to a full stop, nor did it place any restrictions as to the position or location of the automobile, if the trolley car had not stopped<sup>30</sup>

#### Rhode Island

It is provided by law that no person operating a motor vehicle shall pass a trolley car upon the side open to receive or discharge passengers when such trolley car shall be stopped for such purpose<sup>31</sup>

#### Utah.

You are instructed that if you find from the evidence that O. M. crossed, without warning, from the curb toward the street car, from between two parked cars, without stopping, looking, or listening, for the approach of vehicles proceeding east on Second South Street, then you shall find O. M. negligent in that particular, and if you find said negligence contributed to the injuries complained of, then your verdict shall be in favor of defendants and against the plaintiff, no cause of action.

You are instructed that one of the defenses set up by the defendants is that any injuries sustained by O. M. by reason of the accident described in the complaint were proximately contributed to by his own negligence in this, that he suddenly and without warning, ran out from the curb toward the street car, between two parked cars, and stepped directly into the path

<sup>29</sup> Shannon v People's Motorbus Co (MoApp), 20 SW2d 580

102 A 930

<sup>30</sup> Horowitz v Gottwalt (NJSup),

<sup>31</sup> Jordan v Armour & Co (RI),

124 A 465

of the vehicle driven by the defendant L. W. J., at a time and under such conditions that defendant L. W. J. could not by due care avoid the accident, and if you find from the evidence that the said O M did so run out from the curb toward the street car, between two parked cars as aforesaid, and directly stepped into the path of the vehicle driven by the defendant L. W. J., then you shall find that the said O M was negligent in that particular, and your verdict must be against the plaintiff and in favor of defendants, no cause of action.<sup>32</sup>

**Wisconsin.**

The law requires that a driver of an automobile shall stop when a street car is actually discharging and taking on passengers at a street crossing, until the passengers are discharged or taken on. The street car had started as the auto reached it, but the plaintiff might properly have this rule in mind, as bearing upon the proposition of how fast an approaching auto would be likely to be moving, if one were approaching.<sup>33</sup>

**§ 438. — Safety zones.**

If you find from the evidence that the defendant was driving his truck northeastwardly on Massachusetts Avenue at the time and place mentioned in the complaint in a prudent and careful manner having proper regard for the condition and density of the traffic and that the plaintiff stepped from the safety zone on said Massachusetts Avenue into the left side of defendant's truck while it was moving northeastwardly in the regularly traveled portion of Massachusetts Avenue and as a result of plaintiff's walking into the side of defendant's truck, he sustained injuries recited in the complaint, then your verdict should be for the defendant.<sup>34</sup>

**§ 439. Injuries to persons waiting for, entering, or leaving buses.**

The court instructs the jury that if they believe from the evidence that the plaintiff, without looking or listening, negligently walked, or stepped or ran from the front of the standing bus, and place of safety, on Boush Street, in front of the automobile of the defendant, without warning to the defendant, or without giving the defendant sufficient time to stop or avoid the plaintiff, then you should find for the defendant.

<sup>32</sup> Morgan v Bingham Stage Lines Co., 75 Utah 87, 283 P 160

<sup>33</sup> Gilmore v Orchard, 177 Wis 149, 187 NW 1005

<sup>34</sup> Nicholas v Murillo, Circuit Court, Marion County, Indiana, No 40731

The court instructs the jury that the defendant had a right to assume that the plaintiff would not leave a place of safety and walk directly in front of a standing bus and into the path of defendant's moving automobile until the contrary appears, or by the exercise of ordinary care should appear, that the plaintiff is required to use the same degree of care as an ordinarily prudent person would use, and if you believe from the evidence that the conduct of the plaintiff was not such as a person of ordinary care and prudence would use, under the same or similar circumstances, then the plaintiff was guilty of negligence and cannot recover of the defendant in this case, unless the defendant in the exercise of ordinary care had the last clear chance to avoid the accident, as explained in other instructions <sup>35</sup>

**§ 440. —Injuries to persons entering and leaving other vehicles.**

**Georgia**

Y., the driver, had the right, exercising reasonable care, to drive past the point where the plaintiff was standing, and was not required to stop his automobile before proceeding past such point unless he had reasonable cause to believe that so driving past would endanger the plaintiff. <sup>36</sup>

**Indiana**

It is not negligence of itself for a person to alight from or get out on the left-hand side of an automobile, as described in plaintiff's complaint, but it is for you to determine from all the facts and circumstances as disclosed by the evidence in the case whether plaintiff was guilty of contributory negligence that proximately resulted in the injuries sustained by him, if you find he did sustain such injuries <sup>37</sup>

**Maryland.**

The court instructs the jury that if they find that the automobile mentioned in the evidence was being driven east on Baltimore Street in charge of the servant or chauffeur of the defendants, and was being driven at a reasonable rate of speed and on the right of the middle of said street, and shall further find that a wagon on which plaintiff was riding was being driven west on said street on or near the westbound street car tracks in said street, and to the left of the center of said street,

<sup>35</sup> Lucas v Craft, 161 Va 228, 170 SE 836

<sup>36</sup> Brown v Yielding, 206 Ala 504, 90 S 499.

<sup>37</sup> Hoy v Frank Bird Transfer Co., Circuit Court, Marion County, Indiana, No 42660.

and shall further find that, when the wagon and automobile were abreast of one another, the plaintiff suddenly stepped or jumped in the way of said automobile when it could not be arrested in its course, and under circumstances where with ordinary care on the part of the chauffeur, the automobile could not be brought to a stop in time to save the plaintiff from injury, the defendants are not liable, and the verdict of the jury must be for the defendants <sup>38</sup>

**Massachusetts.**

I am told now that no contention is made either that the plaintiff was the guest of the defendant or the employee of the defendant, so that the case goes to you on the question simply whether the defendant was careless in the way he managed the truck after the plaintiff attempted to get aboard it, and whether the plaintiff himself acted as a reasonably careful and prudent man would have acted, or whether on the other hand he too was careless. It is simply a case where one man invites another to ride on his car with him and owes him a duty to give him a reasonable chance to get aboard, and thereafter to manage the car as a reasonably careful man would, the passenger himself being also under a duty to use a reasonable care in the manner in which he attempted to board the car <sup>39</sup>

**Montana**

One who alights from an automobile upon a busy highway in the portion ordinarily traveled by vehicles, is bound vigilantly to use his senses of sight and hearing to determine whether a motor vehicle is approaching, through the operation of which he may be endangered, if the evidence discloses that the plaintiff did not do so and as a result failed to discover the approaching automobile in time to move to a place of safety, then the plaintiff was guilty of contributory negligence and cannot recover. <sup>40</sup>

**Oregon.**

It was the duty of defendants when they saw the truck stop on the edge of their side of the highway, if their automobile was not then under control, to bring it immediately under control and to keep it so while passing the truck, and to take every reasonable precaution to prevent injuring any person who might get off the truck and attempt to cross the highway in front of them. If defendants failed to exercise such reasonable care, and

<sup>38</sup> Epstein v Ruppert, 129 Md 432, 99 A 685

<sup>39</sup> Moat v Magrath, 293 Mass 19, 199 NE 307

<sup>40</sup> Fulton v Chouteau County Farmers' Co, 98 Mont 48, 37 P2d 1025

injury resulted to plaintiff therefrom, defendants themselves would be guilty of negligence, even though the party injured could not recover because of his own negligence <sup>41</sup>

#### Texas

The court instructs the jury that the pedestrian has the right to use any part of the public street, including the sidewalk, for traveling, and if you believe from a preponderance of the evidence that S M got off the wagon testified about, and undertook to go from the north side of Main Street to the south side thereof, traveling in a diagonal direction, that he had the lawful right so to do, and in so doing, he also had the right to assume that all persons in charge of automobiles and driving same on and along said street would drive and operate the same in a lawful manner <sup>42</sup>

#### Washington.

If you find that the deceased, O P S, at the time and place alleged in the complaint, was standing by his vehicle in the public highway in the act of taking a rope therefrom in full view of the defendant, R P, and while so standing, without changing his position, said R P negligently and carelessly drove the automobile, or negligently and carelessly permitted it to run against him, without exercising reasonable care to avoid him, and thereby caused injuries from which he died, she would be guilty of negligence, and the plaintiff would be entitled to a verdict In this connection I also instruct you that, even though you may not be convinced from the evidence that the deceased sustained the injuries from which he died in the manner alleged and set forth in the complaint, but are convinced that the deceased had turned from his vehicle and was in the act of going away from it, and was run into by said automobile without negligence on his part, as I will hereafter refer to, and that his being run into by said automobile was the result of carelessness and negligence upon the part of the defendant R P, the plaintiff would nevertheless be entitled to a verdict <sup>43</sup>

### § 441. — Collision of automobile with bicycle, in general.

#### California

(1) Bicycle riders have the same right as automobile drivers to the use of the streets

<sup>41</sup> Snabel v Barber, 137 Or 88, 300 P 331

<sup>43</sup> Stephenson v Parton, 89 Wash 653, 155 P 147

<sup>42</sup> Bartley v Marino (TexCiv App), 158 SW 1156

Bicycle riders are not required to look back for vehicles approaching from behind to avoid collisions, or to avoid being run over from behind <sup>44</sup>

(2) The operator of a vehicle, including a bicycle, must at all times use due care to avoid colliding with another, he must be ever alert and watchful so as not to place himself in danger

The law of this state provides that the driver of a vehicle, including a bicycle, within an intersection, intending to turn to the left, shall yield to any vehicle approaching from the opposite direction, which is within the intersection, or so close thereto as to constitute an immediate hazard, therefore, if you should find from the evidence in this case that the plaintiff failed to observe this rule or law, and that his conduct in so doing proximately contributed in the slightest degree to the accident in question, then the plaintiff can not recover, and your verdict must be for the defendants <sup>45</sup>

(3) Any person operating a motor vehicle in any public highway shall, in overtaking any other vehicle, pass on the left side thereof, and the rider or driver of such other vehicle shall, as soon as practicable, turn to the right so as to allow of free passage upon his left. It is as much the duty of a person riding a bicycle on a public road, on being approached from behind by another motor vehicle, to "seasonably turn to the right, so as to permit the approaching vehicle to pass him at the left" as it is for the latter to turn to the left to go by

I instruct you, gentlemen of the jury, that if you find from the evidence in this case that the plaintiff, P W, while free from negligence, was riding his bicycle along the Steveny Creek Road, and upon the right-hand side thereof, and that the defendant, C, overtaking him, attempted to pass him upon his right-hand side, and in so attempting to pass said W, collided with him, and thereby injured him, that under such circumstances the said defendant, C, was negligent, and is responsible for the injury inflicted by him, and that plaintiff, under such circumstances, is entitled to recover judgment against him for such amount as you may determine in accordance with the rules already announced <sup>46</sup>

#### Kentucky.

If the jury believe from the evidence that when it became apparent to the plaintiff that there was danger of collision be-

<sup>44</sup> Hart v Farris, 218 Cal 69, 21 398, 33 P2d 1033  
P2d 432

<sup>46</sup> Weaver v. Carter, 28 CalApp

<sup>45</sup> Flury v Beeskau, 139 CalApp 241, 152 P 323

tween the two vehicles, the plaintiff could have maneuvered his bicycle to a place of safety and have avoided the collision, then the law is for the defendant, and you shall so find even though you may believe the defendant was guilty of negligence <sup>47</sup>

**Massachusetts**

You are to take all the evidence, all the circumstances, and determine whether he was doing anything he ought not to have done under all the circumstances. He had the right to make that turn. He had a right to use any part of the street that he was coming into, subject only to the rights of other people who might be here. If two vehicles meet in a street, it is the duty of each one of them, as seasonably as he can, to get each on his own right-hand side of the traveled way of that street. But that law does not compel a man always to be on the right side. He can use any part of the street, so long as he is not interfering with the rights of other people, and the fact that this happened on the right-hand side of the street is only another piece of evidence to be considered by you. You are to consider whether P was endeavoring, in making a turn, to get on the right-hand side near the hydrant, where, under certain circumstances, he properly belonged <sup>48</sup>

**Missouri.**

(1) A bicycle is a vehicle entitled to the same rights of the road as other vehicles and subject to the same obligations as other vehicles to observe the ordinary accepted rules of the road.

In the absence of notice to the contrary the driver had a right to assume that no one would pass him on the right, but would obey the law and pass to the left <sup>49</sup>

(2) If you find from the evidence that defendant operated its bus at or north of the middle line of Lindell Boulevard, and that defendant by the exercise of the highest care could have operated said bus south of the middle of said boulevard, with safety to said bus and the people in it, and that it was practicable to do so, then it was the duty of the defendant to operate said motor-bus south of the middle of the boulevard, and as near the right-hand curb as was practicable, and if you further find that such failure to operate said motor-bus as near said right-hand curb as was practicable was a direct cause of its collision with the bicycle, and that the decedent did not turn his bicycle in front of and in the path of the motor-bus, then you must find for plaintiff <sup>50</sup>

<sup>47</sup> Colonial Supply Co v Bramlett, 249 Ky 382, 60 SW2d 969

<sup>48</sup> Johnson v Shaw, 204 Mass 165, 90 NE 518

<sup>49</sup> McCoy v Home Oil & Gas Co (MoApp), 48 SW2d 113

<sup>50</sup> Nash v People's Motorbus Co



(3) The court instructs the jury that if you believe and find from the evidence in this case that on May —, 19—, the plaintiff was riding a bicycle southwestwardly on Gravois Avenue, between Winnebago Street and Phillips Avenue, and that said streets were open, public streets of the city of St. Louis, and that defendant, by its chauffeur, was then and there operating a truck southwestwardly, on said Gravois Avenue, in back of said bicycle, and that said truck struck said bicycle and caused plaintiff to be thrown therefrom and to be injured and damaged, and if you further find that the defendant's chauffeur in charge of said truck could have avoided said collision, if any, by reducing the speed of said truck, or by swerving the same, before said collision, if any, or by giving the plaintiff a reasonable and timely warning of the approach of said truck, but that he failed to do so, and that such failure, if any, was negligence on his part, and was the direct cause of said collision, if any, then you will find your verdict in favor of plaintiff and against the defendant <sup>51</sup>

#### New Jersey.

If the accident would not have happened except by reason of the joint negligence of the chauffeur and the bicyclist, the plaintiff cannot recover. It is for you to say whether, under the circumstances, you think this young man was guilty of negligence. If he was, and that negligence contributed to the accident, there can be no recovery.

If he saw, for instance, that this automobile was down very close to the curb on the right-hand side, and tried to pass it by going to the left of it, between the automobile and the curb, there can be no recovery, because that would be of itself negligence, provided the distance between the curb and the automobile was so small that it would be apparent to an ordinary man that it would be hazardous for him to undertake to pass it in that way <sup>52</sup>

#### North Carolina

Now, if you find from the evidence and by its greater weight, as alleged by the defendant, that F. H. was riding his bicycle along the street, and that he turned up behind the defendant's truck and caught hold of the hind part of it in some way with his left hand and was holding on to it, and that the driver did not know and could not reasonably have discovered his presence there, and that he was injured by reason of his holding on to

of St. Louis (MoApp), 20 SW2d 570

<sup>51</sup> Irgang v. Tieman Coal & Ma-

terial Co. (MoApp), 46 SW2d 919

<sup>52</sup> Merklinger v. Lambert, 76 NJL

806, 72 A 119

the truck and turning at that time, you should answer the second issue "Yes." If you do not so find, you should answer it "No."

If you find that he was traveling along the street, riding along the street, his hands on the bicycle, not holding on to the truck, and that the truck, without notice, suddenly swerved and turned into Vance Street, the plaintiff would not be guilty of contributory negligence <sup>53</sup>

**Pennsylvania.**

If at the time of the accident, the plaintiff was exercising proper care in passing along the highway, and the defendant negligently managed his machine so as suddenly to imperil the safety of the plaintiff, the latter would not be guilty of negligence if, while exercising the caution of a prudent man, his bicycle struck the curb when he was attempting to escape the peril. In that case, the proximate cause of the accident would not be the act of the plaintiff in riding his bicycle against the curb, but the negligence of the defendant which endangered the plaintiff's safety. If the plaintiff would have been struck and injured by the defendant's automobile had he not deflected from the straight course along the highway as a means of escaping from impending danger, he would not necessarily be guilty of negligence if, in attempting to escape the danger, he did not exercise the care or judgment required of him if it had been his voluntary action. All that was required of him to protect himself from the anticipated danger was to use the care of an ordinarily prudent man, under all the circumstances, and, if he did so, he could not be charged with negligence. When a person has been put in sudden peril by the negligent act of another, and, in an instinctive effort to escape from that peril, falls upon another peril, it is immaterial whether under different circumstances he might and ought to have seen and avoided the latter danger <sup>54</sup>

**South Dakota.**

In this action the boy, M K, by his guardian ad litem, brings suit against the defendant, C N M., claiming to recover for personal injuries concerning which testimony has been submitted before you. The mere fact that the boy was injured by an automobile does not entitle him to recover. He can only recover in case the jury believe from all the testimony that that

<sup>53</sup> Hood v Orange Crush Bottling Co., 192 NC 827, 135 SE 609. See also Cooke v Jerome, 172 NC 626, 90 SE 767, Gilland v Carolina

Crushed Stone Co., 189 NC 783, 128 SE 158.

<sup>54</sup> Wright v Mitchell, 252 Pa 325, 97 A 478.

collision, resulting in some injury to him, was caused by negligent conduct on the part of the defendant in driving his automobile and that the plaintiff was not guilty of any contributory negligence. A person driving an automobile in the streets is under obligation to exercise the care of an ordinarily prudent person in like circumstances and conditions. If he exercised the care and prudence of an ordinarily prudent man in running that automobile, and notwithstanding his care, some injury resulted, he is not responsible, and a verdict should not be rendered against him. Therefore, one of the principal questions, and really the principal question, for you to determine is whether, under all the facts and circumstances of the case, the defendant was exercising the care a reasonably prudent man should exercise, under all the circumstances, in the driving of this automobile at that time.<sup>55</sup>

Utah.

You are instructed that while the part of the street or highway near the street railway tracks is not withdrawn from public use, nevertheless automobiles have a preferential right to passage over that part of the street to which persons riding bicycles must yield.<sup>56</sup>

Washington

If you should find from the evidence that R. S. and his bicycle and the truck of T. & K. were proceeding on Colville Street in the same direction, and that R. S. was immediately ahead of the truck, then I instruct you that R. S. had the right to assume that it was under control. And you are further instructed that said child would have the right to assume that the driver of the truck of T. & K. would yield the right of way to vehicles to the right of the truck of T. & K., simultaneously approaching with it to a given point within the intersection ahead.<sup>57</sup>

#### § 442. — Speed and control.

Alabama

The driver of an automobile is entitled to assume that an apparently competent person, riding a bicycle along the road and in a place of safety, will continue, after being warned of the approach of the automobile, to remain in a place of safety, and such driver, if in the exercise of due care in the driving of such automobile, is under no duty to stop or slacken his speed until

<sup>55</sup> Kriens v. McMillan, 42 SD 285, 228 P 744  
173 NW 731

<sup>57</sup> Sebern v. Northwest Cities  
Gas Co., 167 Wash 600, 10 P2d 210

<sup>56</sup> Dixon v. Bergin, 64 Utah 195,

it becomes reasonably apparent that such person riding on the bicycle is not going to remain in a place of safety <sup>58</sup>

#### Virginia

The court instructs the jury that the right of way ordinance of the city that requires the driver of a vehicle to give the right of way to the driver of another vehicle approaching from the right at street intersections is designed to prevent the stoppage of traffic, otherwise the vehicles have equal rights in the use of the streets, and the right of the driver coming from the left only yields to the driver coming from the right when necessity arises. Therefore, if the jury believe from the evidence that the plaintiff, under 14 years of age, was coasting upon a bicycle down Seventh Street grade, with intent to cross Harrison Street, and run up the grade on the other side of Harrison Street, and that his bicycle was traveling at such speed that the defendant could not in the exercise of reasonable care have stopped his car so as to prevent the coasting bicycle from running into his automobile and thus injuring the plaintiff, then the defendant was not guilty of negligence.

The court instructs the jury that, notwithstanding they may believe from the evidence that the plaintiff's bicycle was coming down Seventh Street grade very rapidly, and not under control, but that the defendant discovered his peril in time by the exercise of reasonable care to have stopped his car and thus avoided the accident, and that he failed to exercise such care, then he was guilty of negligence, unless they believe he acted in a sudden emergency, as defined in the fourth instruction.

The court instructs the jury, if they believe from the evidence that, when defendant, driving his automobile down Harrison Street, approaching the intersection of Harrison and Seventh Streets, discovered the bicycle of the plaintiff moving rapidly down Seventh Street, not under control, and that a sudden emergency was then presented to him of either going forward or stopping his car to avoid imminent collision, and that he undertook to speed up his car and thus avoid the danger, and that his action was such that a person of ordinary prudence might have done under a like situation, but that he failed to thus avoid the collision, he would not be guilty of negligence because another course might have been more judicious <sup>59</sup>

<sup>58</sup> Crescent Motor Co v Stone,  
208 Ala 137, 94 S 78

<sup>59</sup> McGowan v Tayman, 144 Va  
358, 132 SE 316

## § 443. — Horn and other signals from automobile.

## Indiana

The law of Indiana requires that whenever any person who is driving or operating an automobile on any public highway in the state shall overtake and desire to pass any other person who is riding a bicycle or other vehicle proceeding in the same direction, the person who is driving the automobile, coming from the rear, shall signal his intention of passing such bicycle or other vehicle by sounding one long blast of a horn or other signaling device, thereby giving to such overtaken driver or rider an opportunity to turn immediately to the right side of the traveled portion of such highway, so as to allow one-half of the highway to the person desiring to pass and to allow a free passage on the left, and thereby avoiding the danger of a collision between the two vehicles

A failure on the part of either of such parties to do these or any of these things required of them constitutes negligence on the part of the one so failing. And if by such negligence the other is injured or damaged, to which no negligence of his own has contributed, the injured party may hold the other liable in damages

But it is for you to determine from all the evidence in the case whether it was possible by the exercise of reasonable care for defendant in this case to see plaintiff as he was riding ahead; whether defendant did give the required signal on his approach to plaintiff from behind, and whether either or both of the parties did the things required by law as herein stated, and upon those things determine the question of negligence on the part of either plaintiff or defendant <sup>60</sup>

## New Hampshire

A person traveling on a highway and desiring to pass another person ahead of him traveling in the same direction, should give warning and permit the person ahead of him to turn to the right, and should then pass on the left-hand side of the person who is preceding him in the same direction on the highway. This is the law of the road <sup>61</sup>

## New York

By reason of the fact that the boy was overtaking and riding alongside of the truck on the right side, and so placing himself in a position from which he could not have seen the signal arm

<sup>60</sup> Clark v. Bosserman, Circuit Court, Marion County, Indiana, No 42855

<sup>61</sup> Bouvier v. Allen, 87 NH 119, 174 A 783

had it been extended from the left-front side of the truck, the driver's omission to extend it, if so found to be the fact, when slowing down and making the right turn, was not a contributing cause of the accident for which the defendant can be held liable <sup>62</sup>

#### § 444. — Lights.

##### Iowa

The court instructs the jury that in the matter of carrying a light or the failure to carry a light, the matter of ringing a bell or not ringing a bell, you are instructed that the failure to carry a light or failure to ring a bell is not conclusive proof that plaintiff was guilty of contributory negligence, but these facts, like the other evidence in the case, should be taken into consideration by you in reaching your conclusion regarding the circumstances and surroundings of the accident <sup>63</sup>

##### Wisconsin.

You are instructed that it is the duty of a person operating a bicycle upon the public streets after dark to exercise ordinary care for his own safety, and when the exercise of ordinary care, requires the operator of a bicycle upon the public streets after dark to have the same properly lighted, it is the duty of the operator of such bicycle to have the same properly lighted, and unless such bicycle is properly lighted, it is his duty to refrain from operating the same upon streets and highways

It is your duty to find that A P failed to exercise ordinary care at the time and place in question if you believe that it was so dark as reasonably to necessitate having such bicycle lighted for his own personal safety, and the fact that the accident happened within 30 minutes after sunset is immaterial. A person may be guilty of negligence in failing to exercise ordinary care even though he violates no ordinance or statute, and if you are of the opinion that an ordinarily prudent person would have refrained from operating a bicycle upon the public streets under the same or similar circumstances as existed at the time and place of the accident unless the same was properly lighted, it is your duty to find that A P was negligent in this regard <sup>64</sup>

#### § 445 — Collision of automobile with motor-cycle, in general.

##### Alabama

The court charges the jury that the driver of the automobile

<sup>62</sup> *Schneider v Railway Exp Agency, Inc.*, 230 AppDiv 404, 245 NYS 78

<sup>63</sup> *Cook v Fogarty*, 103 Ia 500,

72 NW 677, 39 LRA 488

<sup>64</sup> *Prange v Rognstad*, 205 Wis 62, 236 NW 650

in question, when he attempted to turn into Avenue E, had the right to presume that riders on motor-cycles would not attempt to cross the intersection of Twenty-First Street and Avenue E at a rate of speed so great as to be unable to prevent striking vehicles passing such intersection.<sup>65</sup>

#### California

(1) I instruct you that, if you find from the evidence the relative speeds of plaintiff's motor-cycle and the defendant's automobile were such that at the point of intersection of their respective paths would have brought them in contact if continued, in such case the Motor Vehicle Code of this state required the plaintiff to yield the right of way to this defendant, and if you further find that an omission on his part proximately caused or contributed to this accident, your verdict must be in favor of the defendants<sup>66</sup>

(2) I instruct you that, if the plaintiff here was at and immediately prior to the time of the accident in question, riding his motor-cycle across the intersection of Thirteenth and Jackson Streets in a lawful and proper manner, and there was nothing in the situation then present to warn him as a reasonably prudent person of an impending danger, he might rely upon the presumption that others using the public highway would use reasonable care and prudence, and would obey the traffic laws in their use of the highways, and he would not be guilty of contributory negligence under such circumstances in acting on such presumption.<sup>67</sup>

#### Idaho

If defendants were negligent in cutting the corner at the road intersection, and as a result of such negligence their automobile collided with the motor-cycle of plaintiff, injuring plaintiff, the proximate cause of the injury was the negligent act of appellants, unless such injury was caused by or contributed to by the negligence of defendant, or by his failure to avail himself of the last clear chance<sup>68</sup>

#### Indiana

(1) A person driving an automobile and a person on a motor-cycle have an equal right to the use of the public highways

<sup>65</sup> Karpeles v City Ice Delivery Co., 198 Ala 449, 73 S 642

<sup>66</sup> Grillich v Weinschenk, 64 Cal App 474, 222 P 160

<sup>67</sup> Wixon v Raisch Imp Co., 91 CalApp 129, 266 P 964

<sup>68</sup> Rudolph v Wannamaker, 41 Idaho 98, 238 P 296

It is the duty of the driver of the automobile to use reasonable and ordinary care to avoid colliding with and injuring persons who may be on such highway. A failure to exercise such care whereby anyone is struck and injured is negligence on his part which renders him liable to the injured person, such person being himself without fault contributing to his own injury.

It is also the duty of a person riding on a motor-cycle on the public highways to use reasonable and ordinary care to avoid being injured, and if by reason of a failure to use such care he is injured, his failure is negligence on his part; and if such negligence proximately contributed to bringing about his own injury, then he is guilty of contributory negligence and cannot recover damages for his own injury.<sup>69</sup>

(2) The rights of drivers of automobiles and drivers of motor-cycles along the public highways of this state are equal, and the law requires both to use reasonable care and precaution to avoid accidents and injuries to themselves and others by collision, the precaution to be used by each is that reasonable care which ordinarily prudent persons would exercise or would be expected to exercise under the circumstances.<sup>70</sup>

#### Kentucky

The court instructs the jury that Broadway, at the intersection of Brook Street, is a boulevard. The plaintiffs, J. A. J. and J. M. J., on their motor-cycle, had the right of way over said boulevard, as against the defendant, C. V. W., if they first reached the intersection of Broadway and Brook Streets, or were so near to said intersection that in the exercise of ordinary care on their part, they could not stop or slow up their motor-cycle so as to avoid colliding with the defendant if he moved his automobile out into the intersection. It was the duty of the defendant, C. V. W., to bring his car to a stop before proceeding across Broadway and if the plaintiffs had the right of way as against C. V. W., as herein set out, it was the further duty of C. V. W. not to proceed across Broadway until in the exercise of ordinary care, there was no danger of colliding with the plaintiff's motor-cycle.

If the jury believe from the evidence that defendant failed to observe any one or more of the duties above mentioned, and thereby caused the collision in question, the jury should find for

<sup>69</sup> *Eickmeyer v Colver*, Circuit Court, Marion County, Indiana, No 32542

<sup>70</sup> *Zehringer v Boswell*, Circuit Court, Marion County, Indiana, No 37669



the plaintiff unless they find for the defendant under instruction No 2 <sup>71</sup>

#### Missouri

If defendant S, the driver of the automobile, saw, or by the exercise of the highest degree of care would have seen, plaintiff in a position of imminent peril, in time thereafter, by the exercise of the highest degree of care, to have so slackened the speed of the automobile, or swerved the same, or given warning of its approach, as thereby to have avoided striking the motor-cycle, then your verdict should be in favor of plaintiff, even though plaintiff himself was guilty of negligence contributing to the collision. <sup>72</sup>

#### Ohio

Now, there is this further provision of the law, ladies and gentlemen of the jury, which, while it does not appear in the pleadings, nevertheless, the state of the record warrants the court in charging you that although the defendant may be guilty of negligence, the plaintiff cannot recover if he himself was guilty of negligence causing the injury, or, in other words, if he is guilty of what is called contributory negligence, that is to say if by his failure to exercise ordinary care and caution under the circumstances, he directly contributed to produce the injuries which he suffered. Now, it was the duty of the plaintiff as he was driving his motor-cycle upon the streets of the city of Toledo at said time and place, to exercise ordinary care for his own safety, which is that degree of care which ordinarily careful and prudent people are accustomed to use under the same or similar circumstances, and it is for you, the jury, to determine from all the evidence whether the plaintiff was at said time and place in the exercise of ordinary care as the circumstances under all the evidence required <sup>73</sup>

#### Oregon

I instruct you that if you find that the motor-cycle which plaintiff was operating, without fault or negligence on the part of the defendant, suddenly and unexpectedly appeared immediately in front of the truck of the defendant at a place where the motor-cycle had no legal right to be, then I instruct you that the accident was an unavoidable one as far as the defendant is concerned and that the rate of speed of the truck would

<sup>71</sup> Woods v Jaglowicz, 235 Ky Co. (MoApp), 38 SW2d 277  
637, 32 SW2d 1

<sup>73</sup> Swoboda v Brown, 129 OhSt  
512, 196 NE 274

<sup>72</sup> McPherson v Premier Service

be immaterial, for upon such an appearance, no precaution could have prevented the accident <sup>74</sup>

#### Virginia

The court instructs the jury that at the time and place of the accident it was unlawful for plaintiff's decedent [infant under fourteen years of age] to ride or be transported upon the motor-cycle then and there owned and operated by J. B. O., unless there was a regular seat provided for him on said motor-cycle. And if the jury believe from the evidence in this case that there was no regular seat provided for him upon said motor-cycle and that in riding on said motor-cycle under those circumstances plaintiff's decedent, taking into account his age, general intelligence, maturity and experience, knew, or in the exercise of reasonable care for his own safety should have known, of the danger in so doing, then he was guilty of negligence. And if the jury further believe from the evidence that such negligence either proximately caused or contributed to the death of plaintiff's decedent, then the plaintiff is not entitled to recover of the defendant in this case and the jury should find for the defendant <sup>75</sup>

#### Washington

A motor-cycle is a lawful vehicle and its rights on the highway are the same as an automobile <sup>76</sup>

### § 446. — Speed and control.

#### Alabama.

If the jury find from the evidence that H. C. B. ran his motor-cycle across Avenue E on the occasion complained of, at a high and dangerous rate of speed, and that this was negligence on his part, and was the sole proximate cause of the injury, your verdict must be for defendant.

If H. C. B., the driver of the motor-cycle was racing the motor-cycle across Avenue E, and ran into the automobile (of defendant) because of the great speed at which the motor-cycle was moving, and that was the sole and proximate cause of the action, your verdict should be for defendant.

Even if the jury should believe from the evidence that defendant's agent or servant was negligent in or about the op-

<sup>74</sup> Daniels v Riverview Dairy, 132 Or 549, 287 P 77. See also Mc-

Callister v Farra, 117 Or 278, 243 P 785, Archer v Gage, 126 Or 532, 270 P 521, Brady v Schnitzer, 135

Or 250, 295 P 961

<sup>75</sup> Gough v Shaner, 197 Va 572, 90 SE2d 171

<sup>76</sup> Curtis v Perry, 171 Wash 542, 18 P2d 840

eration of defendant's automobile at the time and place alleged, yet their verdict must be for defendant if they further find from all the evidence that the sole proximate cause of the collision and consequent death of plaintiff's intestate was the high rate of speed of the motor-cycle on which plaintiff's intestate was riding at or near the place of the collision

If you believe from the evidence that the motor-cycle upon which plaintiff's intestate was riding, was running at a greater rate of speed at the time of the collision between it and defendant's automobile than is permitted by the ordinances of the city of Birmingham, and that such excessive rate of speed was the sole proximate cause of plaintiff's intestate's injuries and death, your verdict must be for defendant

Before plaintiff will be entitled to recover on account of any violation of the ordinance with reference to turning from one street into another, such violation of the ordinance must have been the direct cause of the action, and if, when the driver made his turn, the motor-cycles were not then in view, but thereafter ran into the automobile at a high rate of speed, defendant would not be liable for the violation of such ordinance, even if there was a violation <sup>77</sup>

#### New York

If the plaintiff swerved north without exercising proper care, or because he did not have his motor-cycle under proper control, when the unexpected movement of the defendant's truck took place, if it did take place, your verdict must be for the defendant. <sup>78</sup>

#### Oregon.

I instruct you that if you find that the motor-cycle which plaintiff was operating, without fault or negligence on the part of the defendant, suddenly and unexpectedly appeared immediately in front of the truck of the defendant at a place where it had no legal right to be, then I instruct you that the accident was an unavoidable one as far as the defendant is concerned and that the rate of speed of the truck would be immaterial for upon such an appearance no precaution could have prevented the accident. <sup>79</sup>

#### § 447. — Reserved.

<sup>77</sup> *Karpeles v City Ice Delivery Co*, 198 Ala 449, 73 S 642

NYS 856, *affd* in 224 NY 725, 121 NE 856.

<sup>78</sup> *Berckheimer v Empire Carry-ing Corp*, 172 AppDiv 866, 158

<sup>79</sup> *Daniels v Riverview Dairy*, 132 Or 549, 287 P 77

**§ 448. — Arm signals.**

It was the duty of the driver of the truck at the time and place referred to, to exercise the highest practical degree of care to obey the ordinances introduced in evidence and relating to turning to the left to keep his vehicle as near as practical to the center of the street along which he was approaching Forty-Fourth Street, if he desired to turn to the left on the intersection, and relating to giving reasonable warning of his intention to turn by holding his left hand out of the side of the car and below a horizontal position, so that the same could be seen from the rear of his truck

If you find from the evidence that the driver of the truck did not comply with the foregoing provisions of said ordinances, then you are instructed that he was guilty of negligence, and if you find from the evidence that such negligence, if any, directly caused the collision of the truck and the motor-cycle, and if the plaintiff was in the exercise of ordinary care, the jury must find for plaintiff <sup>80</sup>

**§ 449. Collision of automobile with public carrier injuring occupant of carrier.****California**

(1) In backing the truck in question on Twenty-Third Street and down Castro Street in a southerly direction, if you find that the truck was so backed, its driver, the defendant, Mr B, was in law, bound to operate his truck in a careful and prudent manner. In so backing, if you find he did, under the law he had to use his senses of sight and hearing. He had to keep a proper lookout for approaching street cars and to keep his truck under such control as would enable him to avoid a collision with a street car, if by the exercise of ordinary care on his part such collision could have been avoided, and if you find from the evidence he failed so to do, and that his failure to do so was the proximate cause of the accident, then the plaintiff is entitled to a verdict against defendant <sup>81</sup>

(2) You are instructed that a railway track is of itself a warning. It is a place of danger. It can never be assumed that cars or trains are not approaching on a railroad track or that there is no danger therefrom. It is therefore the duty of every person who approaches a railroad track to exercise proper vigilance to ascertain and to know whether any trains or cars

<sup>80</sup> *Bates v Friedman* (MoApp),  
7 SW2d 452

<sup>81</sup> *Corvello v Baumsteiger*, 115  
CalApp 194, 1 P2d 484

are approaching thereon before attempting to cross thereover. Proper vigilance requires every such person to look and listen before going upon such tracks or so close thereto as to be in danger, and if, for any reason, the view to any extent is obstructed the person or persons endeavoring to cross such track or going so close thereto as to be in danger, either of their person or property, should exercise a degree of precaution which ordinary prudence would dictate in such an exigency, that is, in stopping and listening, or even getting out of the vehicle in which they may be riding and going ahead in order to overcome the obstruction to vision if necessary. The looking, listening and stopping thus required should be exercised at the last moment which ordinary prudence would dictate before passing from a place of safety to one of danger.

There is no absolute requirement that the operator of a motor vehicle must actually stop before crossing a railroad track. The question as to whether he should stop, as well as look and listen, being ordinarily a question of fact to be left to you for your determination.

You are instructed that though circumstances may appear in the evidence from which a duty may be cast upon the driver of a motor vehicle, as a man of ordinary prudence, in the exercise of ordinary care, to stop before attempting to cross a railroad track, yet there is no such rule of law applicable to all circumstances, and it is for you to say from the facts of this particular case whether defendant J L F should have stopped, either before he commenced to cross the railroad tracks, or before he crossed the particular track upon which the accident occurred.<sup>82</sup>

#### Ohio

The court instructs you that if you find that the automobile of the defendant arrived at the crossing at Alms Place and McMillan Street in advance of the street car on which the plaintiff was riding, then the driver of said automobile of defendant had the prior right to cross and in so doing, the said driver could assume that the street car would approach the crossing in a careful and prudent manner and that it was under proper control.<sup>83</sup>

<sup>82</sup> Tuller v Atchison, T & S F R Co, 62 CalApp2d 852, 145 P2d 321.

In the case cited, the driver of a motor truck collided with a railroad engine, injuring a railroad employee

A verdict and judgment against the railroad company, the owner of the truck and the driver of the truck, was affirmed.

<sup>83</sup> Curlis v Brown, 9 OhApp 19

## § 450. Automobiles meeting, in general.

## Alabama.

I charge you that if you are reasonably satisfied from the evidence that the defendant, L, was guilty of negligence by being on the left side of the road, instead of being on the right side of the road, and thereby, by reason of that negligence, struck the car of Mr. F. and caused Mr F's car to strike the car of Mr G, he would be as responsible for the damages as if his own car had struck the car of Mr. G, if he thereby set in motion the car of Mr F, and Mr F himself was not guilty of negligence—Mr F would not be liable and Mr L would be liable.

I charge you further, if you are reasonably satisfied from the evidence that Mr L was not operating his car with proper caution, and he caused Mr F's car to start across the road and damage Mr G's car, and after Mr. F's car was hit by Mr. L's car, Mr F did something that a reasonably prudent person would not have done under the circumstances, or did not do something that he should have done, then that would constitute concurrent negligence on the part of both, and your verdict should be against both defendants <sup>84</sup>

## California

(1) Before you can determine whether ordinary care was used or not, you must first determine the facts and what were the circumstances and conditions surrounding the collision and injuries alleged. If, however, you find from the evidence in this case, guided by the instructions, that plaintiffs did not use ordinary care in the three particulars specified by the defendant, or in any one of them, to wit transportation of inflammable gasoline upon the truck, in the manner alleged, or failing to drive upon the right-hand side of the highway, but over and along the middle of the highway, as alleged, or failing to carry lights upon said truck on the extreme left-hand side thereof, as alleged, and if you also find that such acts or omissions on their part, or any of them, contributed proximately to the collision or injuries complained of, if any, you may determine these acts and omissions, or acts, or omissions so found by you, to be contributory negligence on the part of the plaintiffs, and if you do so determine that contributory negligence is established in this case, your verdict should be for the defendant. <sup>85</sup>

(2) You are instructed that the law of this state at the time of the happening of this accident required plaintiff, J., to

<sup>84</sup> Lang v. Gunn, 23 AlaApp 574, 129 S 318

<sup>85</sup> Harrison v Harter, 129 CalApp 22, 18 P2d 436 See also Sartori

v Granucci, 204 Cal 28, 266 P 280, Myers v Rovai, 66 CalApp 518, 226 P 844, Elsey v Domecq, 114 CalApp 42, 299 P 794

travel on the right-hand side of the highway and close to the right-hand edge or curb of such highway unless such right-hand side was obstructed, and, if you find that at the time of this accident, plaintiff, J, was not traveling upon the highway as provided by law, then he was negligent, and if you further find that such negligence proximately caused or contributed, even in the slightest degree, to the happening of the said accident, then plaintiff, J., can recover nothing from this defendant on account of injuries to said J, if any.<sup>86</sup>

#### Connecticut.

The plaintiff makes one further claim, based upon the theory that you may conclude that it did not happen where the plaintiff says it happened, but happened on the other side of the road, where the plaintiff's automobile had no business to have been. And the plaintiff has claimed to you in argument that as those vehicles came toward each other, the defendant had opportunity and notice, and that it was his duty to make a further turn to the right, and that if he had done that, he could have avoided the injury. And the rule of law is fairly enough stated in this way. That if the defendant, after seeing the danger of the plaintiff, no matter how the plaintiff got into it, could in the exercise of reasonable care have turned further and so have avoided the injury, it was his duty to do so. The plaintiff claims that, if it did not happen as his witnesses swear it did, and did happen somewhere else, still the defendant could have prevented it, if he had swung over into the trolley track further. Where the standard is reasonable care, the conduct of these men has to be considered and interpreted with reference to the situation as it existed, and the time and means of observation.<sup>87</sup>

#### Florida

A person operating a vehicle along a highway on his side of the road, has a right to assume that the person in charge of a vehicle coming from the opposite direction, will observe the rules of the road, and will exercise due care to avoid an accident; and he has a right to act upon this assumption, even though the vehicle coming from the opposite direction is in the center of the roadway on the wrong side of the road. He has a right to assume that the vehicle approaching on its side of the road will remain on that side, and that if it is approaching on the wrong side of the road, it will turn to the right side in time to avoid danger.<sup>88</sup>

<sup>86</sup> Jackson v Miller, 130 CalApp 102 A 655  
427, 20 P2d 113

<sup>88</sup> Zorn v Britton, 120 Fla 304,

<sup>87</sup> Wing v Eginton, 92 Conn 336, 162 S 879

**Georgia**

It is the duty of the operator of a motor vehicle to operate the same in such a manner as to give all other operators of vehicles the right to one-half of the traveled roadway, if practicable, and also a fair opportunity to pass without any unnecessary interference

If a person operating a motor vehicle chooses on a dark, rainy night to use the left-hand side of the road, it is his duty to be on the alert, use his eyes, his ears, and all of his senses to exercise care and caution to prevent injury either to himself or the other persons lawfully entitled to use the road <sup>89</sup>

**Idaho**

The court instructs the jury that section 49-709 of the Idaho Code provides as follows: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one line of traffic in each direction, each driver shall give to the other at least one-half of the main-traveled portion of the roadway as nearly as possible."

If the jury believe from the evidence that at the time of the accident, the defendant was driving his car on the left-hand side of the traveled portion of the road, and that in driving said car on the left-hand side of the traveled portion of said road the defendant failed to exercise ordinary care, then the defendant would be guilty of negligence, and if you believe from a preponderance of the evidence that defendant's negligence in that regard was the proximate cause of the injury, and that the deceased, J H M, was free from contributory negligence, then your verdict should be for the plaintiffs in this case. <sup>90</sup>

**Illinois**

(1) If you believe from the evidence in this case that the defendant, M, immediately prior to the collision in question, was driving in an easterly direction upon the south side of the black line down the middle of the hard road and that the car in which the plaintiff was riding approached from the east on the south side of the black line down the middle of the hard road and that it was reasonably apparent to the defendant that a collision was imminent and if you further believe that the defendant when thus confronted with impending danger of a collision, if you find from the evidence he was so confronted, turned to the left and onto the north side of the black line

<sup>89</sup> Roberts v Phillips, 35 GaApp 743, 134 SE 837, *affd* in Phillips v Roberts, 166 Ga 897, 144 SE 651

<sup>90</sup> McCoy v Kregel, 52 Idaho 626, 17 P2d 547



down the middle of said hard road and that in so doing the defendant did what an ordinarily prudent man would have done under similar circumstances, then the defendant was not guilty of negligence in turning onto the north side of the black line and would not under the conditions above outlined be liable in this case

The court instructs the jury that by his declaration in this case, the plaintiff charges that the defendant was negligent in the operation of his truck in that when, within about 50 feet of the car in which plaintiff was riding, the defendant turned said truck and drove it with great speed from the south side of the public highway to the north side thereof at and toward the car in which plaintiff was riding so that the truck of the defendant was caused to and did collide with the plaintiff's automobile, although the plaintiff's car left the pavement on the northerly side and turned in a northerly direction off the pavement in order to escape collision with defendant's truck. In order to recover in this case, it is incumbent upon the plaintiff to prove the said charge by a preponderance of the evidence in this case and if you find that he has failed to so prove the said charge in his said declaration, then your verdict should be for the defendant <sup>91</sup>

(2) The court instructs the jury that at the time when and the place where the automobiles mentioned in the evidence came into collision with each other, the law of Illinois imposed upon the driver of a motor vehicle when meeting another vehicle on a public highway, to seasonably turn his vehicle to the right of the center of the beaten track of said highway so as to pass without interference

And if the jury find and believe from the evidence that route No 13 mentioned in the evidence was at the time and place mentioned, a public highway in the state of Illinois and further find that the defendant B's driver of said automobile truck while driving and operating the same on said highway at the time of and immediately before said automobiles in question came into collision, negligently failed to seasonably turn defendant's automobile truck to the right of the center of the beaten track of said highway so as to pass the automobile in which plaintiff was riding without interference, then such failure, if any, was negligence on the part of the defendant, B's driver, and if the jury find and believe from the evidence that as a direct consequence of such negligence above specified, if any,

<sup>91</sup> Bunch v McAllister, 266 IllApp  
248

plaintiff was injured, and at the time plaintiff was in the exercise of ordinary care for his own safety, then you will find for the plaintiff and against the defendant.<sup>92</sup>

#### Indiana

(1) The court instructs the jury that the law requires that persons who meet on the highway shall each keep to the right. This, however, does not give a person a right to keep to the right of the road regardless of consequences. It simply means that his duty is to keep to the right, unless he has some warning to indicate to him that he must take some other course to protect himself or to avoid injury to others.<sup>93</sup>

(2) If you find from the evidence in this case, that the driver of the bus in question, at the time and place in question, upon meeting the automobile in which plaintiff was riding, did drive or operate said bus in a reckless or dangerous manner, and so as to endanger the life or limb of other persons, or that said driver drove said bus on that side of the highway which was to the left of the driver or that he drove the same from one side to the other of said highway or in any other manner that was not safe and prudent, at said time and place, then the court instructs you that said driver of said bus was guilty of reckless driving and if you further find that on account of such reckless driving, said bus collided with the automobile in which plaintiff was riding and on account of such collision, plaintiff was thereby injured as alleged in the complaint and without negligence upon her part, then the court instructs you that the plaintiff is entitled to recover and your verdict should be for the plaintiff.<sup>94</sup>

#### Iowa

(1) It was the duty of the defendant, at the time and place in question, to travel on the right side of the highway, or the north side thereof. If you find from the preponderance of the evidence that the defendant has violated this duty, then such violation would constitute negligence on her part.<sup>95</sup>

(2) It is the duty of persons driving automobiles, on meeting each other on the public highway, to each yield one-half of the traveled way thereof by turning to the right, and the defendant, B, had a right to assume that the driver of the automobile in which the plaintiff was riding would do this

<sup>92</sup> Loveless v Berberich Delivery Co., 335 Mo 650, 73 SW2d 790 v Ford, 96 IndApp 639, 185 NE 525

<sup>93</sup> F W Cook Brew Co v Ball, 22 IndApp 656, 52 NE 1002

<sup>94</sup> Interstate Public Service Co

<sup>95</sup> Winter v Davis, 217 Ia 424, 251 NW 770. See also Needy v Littlejohn, 137 Ia 704, 115 NW 483

until the defendant, B, knew, or until in the exercise of ordinary care he should have known, otherwise.<sup>96</sup>

(3) The court instructs the jury that if you find by a preponderance of the evidence that the deceased, without good reason or justification, and failing to use ordinary care, was negligent in turning to the left, if he did so turn, or if the deceased negligently failed to turn to the right, and by reason thereof collided with plaintiff's automobile and damaged same and injured plaintiff, such negligence, if any, was the proximate cause of plaintiff's injuries as alleged, the deceased was responsible for the damage<sup>97</sup>

(4) You are instructed that it is the law of this state that vehicles meeting each other on the public road shall each give one-half of the same, by turning to the right, and a failure in this regard shall make the delinquent liable for all damages resulting therefrom. You are instructed that the phrase "vehicles meeting each other" does not mean merely vehicles passing each other while going in opposite directions, but it implies a coming together in such manner that there would be an actual collision or apparent danger of one if they should pursue their course without change or direction. If one person or vehicle travel along one side of a highway and another passes along the other side, there is no meeting within the meaning of the statute and no violation of its provisions, and that would be true even though each person or vehicle would be on the left side of the highway. You are instructed that the failure of one part to give one-half of the road by turning to the right in meeting a vehicle only renders him liable for damages when his failure to give one-half of the road by turning to the right is the direct and proximate cause of the injury or damages to the other, if any. In other words, the simple fact that a man drives on the left-hand side of the road and fails to turn out to the right upon meeting another vehicle does not render him liable for damages, if any, to the other person, unless his failure to turn out was the direct and proximate cause of the injury or damage to the other, if any.<sup>98</sup>

#### Kentucky.

(1) It was the duty of the driver of the truck to seasonably turn to the right of the center of the highway so as to pass other vehicles approaching without interference.<sup>99</sup>

<sup>96</sup> Fry v Smith, 217 Ia 1295, 253 NW 147

<sup>97</sup> McSpadden v Axmear, 191 Ia 547, 181 NW 4

<sup>98</sup> Baker v Zimmerman, 179 Ia 272, 161 NW 479

<sup>99</sup> Huber & Huber v Noe's Admr, 252 Ky 779, 68 SW2d 406

(2) If you believe from the evidence that at the time the car of the deceased was approaching the truck, the deceased was driving on the left side of the highway, or did not have his car under reasonable control, or did not keep a lookout, or did not use ordinary care in the management and control of his car, and that by reason of any one or all of said acts, if any, the deceased contributed to his death to such an extent that but for it, the death would not have occurred, you will find for the defendant <sup>1</sup>

#### Maryland

(1) The driver of an automobile has the right to proceed on his or her journey along the middle of the road, but in doing so, must be prepared to turn to the right in time to allow an approaching vehicle to pass on its right without collision if its driver is using such care as an ordinarily prudent person would use under the like circumstances

And, if the jury shall believe from all of the evidence in this case that the automobile in which the plaintiff was riding did not turn to the right of the center of the highway upon meeting the automobile driven by the defendant, J D, then the failure to do so was evidence of negligence, and, if the jury shall believe that such failure caused the plaintiff's injury, their verdict shall be for the defendants <sup>2</sup>

(2) The court instructs the jury that under the law all vehicles when being driven upon the highways of this state, upon meeting others, are required to turn to the right of the center of the highways so as to pass without interference, and in rounding curves to keep as far to the right of the road as reasonably possible.

If the jury shall find from the evidence that the A O. Co's truck prior to and at the time of the accident was being driven with due care and at a reasonable rate of speed on its own side of the road, but that the bus of the C & W T. Co. (plaintiff) was being driven so far to the left of the center of the highway that there was not room for the truck to pass with safety between said bus and the embankment on the southerly side of the highway, and shall also find that the driver of the truck by the exercise of ordinary care could not have avoided the collision, then the verdict of the jury shall be for defendant A O Co <sup>3</sup>

<sup>1</sup> Whitney Transfer Co v Smith's Admr, 256 Ky 844, 77 SW2d 440

<sup>2</sup> Kaline v Davidson, 146 Md 220, 126 A 68

<sup>3</sup> Cumberland & Westernport Transit Co v Metz, 158 Md 424, 149 A 4, 565

**Michigan**

(1) The defendant, L, had a right to drive his car upon any part of the highway, provided he kept his car under such control that he could seasonably turn to the right side of the road when meeting another vehicle

If you find that the defendant's bus was at the time of the accident being driven on the wrong side, or partly on the wrong side of the center of the highway, then the defendant L was presumably guilty of negligence

The fact that one does not give the other the full half of the road to which he is entitled is not conclusive evidence of negligence, and even if negligence, it still must be established by a preponderance of the evidence that this part failure was a proximate cause of the injury <sup>4</sup>

(2) Under the circumstances of this case, one who violates the law of the road by driving an automobile on the wrong side assumes the risk of such experiment, and if injury is caused thereby to another, then the driver driving on the wrong side of the road, having assumed the risk of such experiment, is guilty of negligence, and it would make no difference whether he was driving fast or slow. <sup>5</sup>

(3) The court instructs the jury that if they should find that the plaintiff was driving on the traveled track, and on the approach of the defendant, and as soon as he saw him, the plaintiff attempted to turn to the right, and was in fact in the act of turning to the right, and the defendant did not turn to the right, and defendant was guilty of negligence, thereby causing the collision, then the plaintiff would be entitled to recover, as it is the duty of the defendant to seasonably turn to the right as well as for the plaintiff <sup>6</sup>

**Minnesota.**

(1) He was required to drive to the right of the middle of the traveled part of the road.

It may have been in this case as it frequently happens within the knowledge of everybody in our public highway, that the public travel at certain places will be concentrated in one track That track may be on the center of the available unobstructed roadway or not, but whoever travels in that track runs his risk if he gets on the wrong side of the road.

<sup>4</sup> Anderson v Lynch, 232 Mich 675, 179 NW 300

276, 205 NW 134

<sup>6</sup> Buxton v Ainsworth, 153 Mich

<sup>5</sup> Marsh v Burnham, 211 Mich 315, 116 NW 1094

The object of this law is really to require travelers going in one direction to go on the right hand, and the travelers in the other direction on the other side, so that in effect there will be two traveled tracks if the law is observed in all places

The law fixes his rights at the center or middle of the traveled part of the road. Now if the middle of the traveled part of the road was midway between those ruts he had no right to put both his wheels in both those ruts. The most he could do was to put his left wheel in the right rut.

Now if you find that the defendant was violating this statute in allowing his car to encroach over the middle of the traveled part of the road, and such road was of sufficient width to permit passing, then as a matter of law he was negligent.<sup>7</sup>

(2) The evidence shows in this case conclusively that the plaintiff was to the left of the center of the street at the time of the collision. This, as I have already indicated, is negligence, unless you find that some reasonable necessity required him to pass to the left of the center of the street. If you find that the plaintiff, while exercising reasonable and ordinary care in the driving and in the control and management of his car under all the conditions as they existed on the street there at that time, was unable to avoid passing to the left of the center of the street, then he would not be guilty of negligence in so doing. But if you find that he was not exercising reasonable and ordinary care in the matter of the speed at which he was driving, or in the matter of the management or control of his car under the conditions of the traffic and conditions of the street which existed there at that time, and you find that, by reason of this failure on his part to use reasonable and ordinary care, he was forced to go or did go to the left of the center of the street, then he would be guilty of negligence.<sup>8</sup>

#### Mississippi.

The court instructs the jury, that if you believe from all the credible evidence in this case, that when the bus approached the scene of the collision it was on the right-hand side of the highway going south, and running in a careful manner, and that the car in which plaintiff was riding, approached the scene of the collision on the left-hand side of the center of the highway, going north, and in order to avoid a head-on collision between the car and the bus, the further turned to the right-hand

<sup>7</sup> Lahiff v McAloon, 152 Minn 517, 189 NW 435

<sup>8</sup> Dohm v R. N. Cardozo & Bro., 165 Minn 193, 206 NW 377

side of the road and that the car, being on the left of the center of the road turned suddenly to the right and skidded into the rear end of the bus, knocking the car into the ditch on the right-hand side of the road, looking north, then your verdict should be for the defendant <sup>9</sup>

#### Missouri

(1) It is not negligence, as a matter of law, to drive upon the wrong side of the road when the vehicles are a quarter of a mile apart. <sup>10</sup>

(2) If the driver of the truck failed to drive the same as near the right-hand side of the road as practicable, and his failure to do so was the sole cause of the collision, then your verdict must be for defendant <sup>11</sup>

(3) The court instructs the jury that if you find from the evidence that on the occasion in question, the automobile in which plaintiff was riding was being driven westwardly on the right-hand side of the roadway, and if you further find that defendant was driving her automobile eastwardly on said roadway and to the left of the center of said roadway, and that defendant in so doing failed to drive her said automobile as close to the right-hand side of the roadway as was practicable, and if you further find that while so driving said automobile on said roadway, the defendant failed to swerve or turn said automobile away from the automobile in which plaintiff was riding, and that by so swerving or turning said automobile, the defendant could thus and thereby have avoided the aforesaid collision, and that in thus failing to swerve or turn said automobile, the defendant was guilty of negligence, and that the plaintiff was injured as a direct and proximate result of the aforesaid acts of negligence on the part of the defendant, then your verdict will be in favor of the plaintiff and against the defendant herein <sup>12</sup>

(4) If you find and believe from the evidence that on January —, 19—, plaintiff was riding in the automobile mentioned in the evidence, and that it was driven by her husband in a southwardly direction along and upon Gravois Avenue and River Des Peres Bridge, mentioned in the evidence, on the right-hand side thereof; and that while plaintiff's husband operated said automobile, as aforesaid, the defendant, at said

<sup>9</sup> *Boothe v Teche Lines*, 165 Miss 343, 143 S 418

<sup>10</sup> *White v Missouri Motors Distributing Co.*, 226 MoApp 453, 47 SW2d 245 See also *Stanton v*

*Jones*, 332 Mo 631, 59 SW2d 648

<sup>11</sup> *Felts v Spesia* (MoApp), 61 SW2d 402

<sup>12</sup> *Goehring v Beltz* (MoApp), 60 SW2d 665

time, operated his automobile in a northwardly direction along and upon said street and bridge, and that said automobiles then and there came into violent collision, and if you further find and believe from the evidence that as defendant's automobile approached the said automobile in which plaintiff was riding, coming from the opposite direction, that the defendant's automobile was traveling on the west or left-hand side of said roadway and toward the automobile plaintiff was riding in, and if you further find that said defendant then and there failed and omitted to turn his said automobile to the right of the center of said roadway so as to pass the said automobile in which plaintiff rode without interference, after the defendant saw, or by the exercise of the highest degree of care could have seen, said automobile in which plaintiff was riding approaching on said roadway in time to have so turned and passed said automobile of plaintiff without interference, then if you so find the facts to be, the court instructs you that the defendant was guilty of negligence. If you further find that such negligence, if any, of defendant directly caused or contributed to cause, said automobiles to come into violent collision, and that plaintiff sustained injuries as a direct result of said collision, then plaintiff is entitled to recover in this action <sup>13</sup>

**New York.**

(1) Where two vehicles are approaching each other on a street in daylight, and there is no obstruction to the view between them, and no excusing circumstances, a driver of one vehicle is negligent if he does not see the other vehicle. If he had looked, he must have seen <sup>14</sup>

(2) A traffic regulation of the police department of New York City, in force at the time of the accident, provides as follows "11-a A moving vehicle shall keep as near as practicable to the right-hand curb so that faster moving traffic may pass on the left"

The violation of this traffic regulation by either of the drivers would be evidence of negligence which could be taken into consideration with all the other evidence as bearing on the issue of negligence, provided you also find that there was a causal connection between the violation of the regulation and C's injury <sup>15</sup>

**North Carolina**

The rule to be observed by the driver of an automobile

<sup>13</sup> King v Friederich (MoApp), 43 SW2d 843

<sup>14</sup> Rounds v Fitzgerald, 207 App Div 534, 202 NYS 595, affd in 239

NY 568, 147 NE 199

<sup>15</sup> Callahan v Terminal Cab Corp., 234 AppDiv 794, 253 NYS 1022, revg 259 NY 112, 181 NE 67



when he approaches another automobile, coming from the opposite direction, on a public highway in this state, in order that the automobiles may pass each other in safety, is prescribed by statute as follows "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving the other at least one-half of the main traveled portion of the roadway, as nearly as possible" [N. C. Gen. Laws § 20-148].

The driver of each automobile, who is himself observing the rule, has the right, ordinarily, to assume that the driver of the other automobile will also observe the rule, and thus avoid a collision between the two automobiles when they meet each other. Neither is under a duty to the other to anticipate a violation of the rule by him. When the driver of one of the automobiles is not observing the rule, as the automobiles approach each other, the other may assume that before the automobiles meet, the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety. One is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act on the assumption, that others will exercise ordinary care for their own safety.<sup>16</sup>

#### Ohio

Now, if the defendant was, as the plaintiff claims, driving his car on approximately the middle line, the middle part of this paved portion of the road, he was where he did not belong, and if because of that fact, if that is a fact, this collision occurred, and the plaintiff himself was free from any negligence directly causing or contributing to the collision, then the plaintiff is entitled to recover in this case.<sup>17</sup>

#### Oklahoma.

It is the duty of a person operating an automobile to maintain a lookout for other vehicles, persons, and objects approaching from the opposite direction.

One operating an automobile upon the highways of this state in conformity with the law and in a careful manner has a right to rely upon the assumption that the driver or operator of another automobile, approaching from the opposite direction, will not only comply with the law and keep to the right of the center of the road, but will also use reasonable

<sup>16</sup> James v. Carolina Coach Co., SE 767

207 NC 742, 178 SE 607. See also

<sup>17</sup> Sumner Co. v. Fisher, 28 Oh App 219, 162 NE 639

Cooke v. Jerome, 172 NC 626, 90

care in passing to the left of each other. This rule has no application to one who is operating an automobile in a negligent manner <sup>18</sup>

#### Rhode Island

If you find that at the time of the accident the plaintiff was driving upon Point Street on his right side of the highway, and was in the exercise of ordinary care, and the driver of the truck of the defendant company suddenly drove his truck to the left side of the highway in an effort to pass a car in front of him, and the plaintiff was unable, by the exercise of ordinary care, to get out of the way of the truck, owing to the suddenness of defendant's approach in front of him, then the defendant company is liable for the injuries received by the plaintiff <sup>19</sup>

#### South Carolina.

Under the state law, a driver does not have to drive to the center of the highway all the time. If there is no one on his side of the road, he can drive in the center, on the right or left of the road. If he is meeting a person, then it is his business to turn to the right of the center of the road. <sup>20</sup>

#### Washington

(1) You are instructed that negligence is never presumed, but must be established by a preponderance of the evidence, the same as any other fact in the case, and unless you find from a preponderance of the evidence in this case that the charge in plaintiff's complaint that defendant was driving his automobile on his left-hand half of the highway is true, your verdict must be for the defendant. <sup>21</sup>

(2) If you find that both northbound and southbound traffic used the paved portion of Fauntleroy Boulevard, then both the truck driver and the deceased had equal rights to travel on such paved portion, and it was the duty of meeting drivers seasonably to turn their vehicles to the right of the center of the paved portion <sup>22</sup>

(3) You are instructed that if you find from a fair preponderance of the evidence in this case that plaintiffs were traveling at a lawful rate of speed and on their right side of the paved portion of the highway when the automobile in which they were riding was struck by the automobile driven

<sup>18</sup> Skaggs v Gypsy Oil Co, 169 459, 121 SE 370  
Okl 209, 36 P2d 865

<sup>19</sup> Ribas v Revere Rubber Co, 321, 289 P 19

37 RI 189, 91 A 58

<sup>20</sup> De Lorme v Stauss, 127 SC

Wash 461, 40 P2d 991

<sup>21</sup> Van Cello v Clark, 157 Wash

321, 289 P 19

<sup>22</sup> O'Connell v Home Oil Co, 180

by the defendant, J O, that the burden is upon said defendant, if he would be excused of negligence by reason of his getting on the wrong side of the highway, to prove to your satisfaction that he got on the wrong side of the highway and remained thereon until the collision occurred, through no negligence of his own <sup>23</sup>

(4) The court instructs the jury that in determining the line that would constitute the center of the highway, you are instructed that turning to the right of the center of the highway means the right of the center of that part of the highway, whether gravel or dirt road, which is contiguous and at the time open and in a reasonably safe and fit condition for travel by the ordinary modes. If, however, the highway in question, which means the space from the fence on one side to the fence on the other, had upon it two or more beaten traveled tracks, one of them gravel and the other dirt, and if each had defined and well-marked limits or boundaries, with a plain and distinct line of demarcation between them, the right of the center of the highway to one who was using one of these traveled tracks in such an event would mean the right of the center of the track on which such person was at the time traveling.

The court instructs the jury that it is not necessary to the exercise of due care on the part of the driver of an automobile that he anticipate that the driver of another car, which he is about to meet, will violate the law of the road by driving on the wrong side of the highway. One who violates the law of the road by driving on the wrong side assumes the risk of such an experiment and is required to use greater care than if he had kept on the right side of the road. If a collision takes place under such circumstances, the presumption is against the party who was on the wrong side. But the presumption is *prima facie* and has the effect only of casting the burden of justifying his position upon the man who was on the wrong side.

If you find that at the time of the collision the plaintiff was driving his automobile on his left of the center of the traveled part of the highway, and that the driving of his car to the left of the center was the proximate cause of the collision, your verdict will be for the defendants, unless you further find by a preponderance of the evidence that plaintiff in turning his car to the left of the center of the highway, if he did so turn it, acted under an emergency such as would justify a reasonable man under like circumstances in believing that it was necessary

<sup>23</sup> Thomas v Adams, 174 Wash 118, 24 P2d 432

to so turn his car to the left in order to prevent an imminent collision with the defendants' car, and the plaintiff must have honestly believed and have had reasonable ground to believe that such a course on his part was the only way to avoid imminent collision with the defendants' car. It was plaintiff's duty in meeting and passing defendants seasonably to turn to the right, and would only be excused from the performance of that duty upon the happening of an emergency in the nature of an apparent danger of collision with defendants' car in case he obeyed the law of the road and turned to the right. If at the time plaintiff turned his car to the left of the center of the highway, if he did so turn it, the defendants' car was far enough away so that a reasonable man under like circumstances would not honestly believe that a collision was imminent if the law of the road were obeyed, then the plaintiff would be negligent in turning his car to the left, and, if doing so was the proximate cause of the collision, the plaintiff cannot recover.<sup>24</sup>

#### Wisconsin

(1) Every traveler has a right to assume that every other traveler will use ordinary care on his part, and also to assume that any other approaching in front will seasonably turn or keep to the right, until it becomes apparent that he cannot do so, or is unaware of danger.<sup>25</sup>

(2) The first question is this:

On September —, 19—, at the time and place where the automobiles of the defendant and of C collided, was any part of defendant's car at the time of collision on the defendant's left side of the middle of the traveled road?

The law requires that when the operators of automobiles meet upon a public highway, each shall seasonably drive his vehicle to the right of the middle of the traveled part of the highway so that each may have one-half of the roadway and that they may pass without interference. The question is whether the defendant, D F, failed to obey this provision by driving her car so that some part of it extended over to the left side of the middle of the traveled part of the highway at the time and place of this collision. This is a simple question which cannot be made more plain, and you are to answer it from the evidence.

<sup>24</sup> *Shelley v Norman*, 114 Wash 381, 195 P 243

<sup>25</sup> *Mitchell v Raymond*, Circuit

Court, Lincoln County, Wisconsin, see 181 Wis 591, 195 NW 855

The second question is this:

If you answer the first question "Yes," then answer this Ought the defendant to have foreseen that the driving of her car where she drove it might probably cause damage to another traveler on the highway?

First observe that you are not to answer this question unless you answer "Yes" to the first question. If you answer "No" to the first question, leave the second question unanswered

It was the duty and obligation of the defendant, under the circumstances in which she was acting, to foresee all such natural consequences of her conduct as an ordinarily prudent, intelligent operator of an automobile would ordinarily foresee under like circumstances. Considering her in that light and considering the position of her car at the time of the collision, in case you find that it was partly to the left of the middle line of the road, you are thereupon to answer whether, in those circumstances and the other circumstances surrounding her, she ought reasonably to have foreseen that driving her car into the position where it was at the time of the collision might probably produce injury or damage to some other traveler on the highway <sup>26</sup>

#### § 451. — Speed and control. <sup>27</sup>

Every operator is bound to use his senses and faculties in a manner commensurate with the danger and is bound to anticipate that he may meet persons or vehicles at any point, and he must keep his automobile under such control as will enable him to avoid collision with any other person or vehicle traveling upon the highway with ordinary care and caution. On meeting another vehicle, he must keep to his own right side of the road and must slow down, and even stop, if the circumstances at the time require the same in order to avoid a collision <sup>28</sup>

#### § 452. — Lights. <sup>29</sup>

California.

If you find that the proximate cause of whatever injuries plaintiff has shown he has sustained by reason of the collision, was the failure of the defendant C D to drive and operate his truck on his right side of the middle of the highway, or was

<sup>26</sup> Knutson v Fenelon, Circuit Court, Oneida County, Wisconsin, see 200 Wis 261, 227 NW 857

<sup>27</sup> See also §§ 344-353, 381, 386, *supra*

<sup>28</sup> Gilbert v Popp, Circuit Court, Marathon County, Wisconsin, see 204 Wis 622, 235 NW 680

<sup>29</sup> See also §§ 356, 372, *supra*

the failure to have his truck lighted, as elsewhere herein instructed, then I charge you you must find a verdict in favor of the plaintiff.<sup>30</sup>

#### Colorado

The absence of plaintiff's headlight, if the collision would not have taken place without it, either because it misled the defendant as to the location of plaintiff's car, or because it led the plaintiff to turn into the trailer, would prevent a verdict for plaintiff.<sup>31</sup>

#### Ohio.

(1) Charge No. 1. The headlights which the law requires an automobile to carry are intended both to aid the driver in seeing the road over which his car is to travel, and also to assist others to see and observe the approach of such automobile, and I say to you that the driver of an automobile, in the absence of notice or knowledge to the contrary, who himself is obeying the laws and rules applying to motorists using the highways of the state of Ohio, may assume that other persons who may be also using said highway, upon observing the approach of his automobile upon the highway will use ordinary care for their own safety.<sup>32</sup>

(2) Likewise as to the lights, if the defendant did not have those headlights on, as the plaintiff claims, and of the character substantially as I have explained to you, and because he did not have those headlights on, this collision occurred, and the plaintiff himself was free from negligence directly causing or contributing to the collision, then the plaintiff is entitled to recover, or if the defendant was negligent in both respects, that is, driving approximately in the middle of the highway, and without lights, and these were the causes of the collision, and the plaintiff himself was free from negligence directly contributing to the collision, then the plaintiff is entitled to recover

On the other hand, if the defendant did have headlights of the character I have defined, and if he was driving on his right side of the highway, then the plaintiff is not entitled to recover, and your verdict should be for the defendant in such case. Or, if you find that the defendant was driving on his right side of the highway, and even though he did not have lights, nevertheless, if the plaintiff himself was driving on his left or on the wrong side of the highway, as to him, and by so

<sup>30</sup> Elsey v Domecq, 114 CalApp 464, 195 P 105  
42, 299 P 794

<sup>31</sup> Martin v Cairuthers, 69 Colo

<sup>32</sup> Jones v Butler, 72 OhApp 335,  
27 OhOp 273, 52 NE2d 347

doing caused or contributed to this collision, then the plaintiff cannot recover.<sup>33</sup>

(3) That section prescribes the duties devolving upon the driver of an automobile upon the highway after night when meeting approaching vehicles, and it applies to both parties in this case. The defendant has offered testimony tending to show that he had complied with the law concerning what are commonly spoken of as "nonglare headlights." Notwithstanding the fact that he may have complied with the requirements of the law insofar as the nonglare headlights are concerned, it remains a matter of fact for the jury to determine whether or not upon meeting plaintiff's car, he controlled his headlights so as to come within the provisions of this section of the statute which I have just read to you.<sup>34</sup>

#### § 453. — Marked traffic lanes.

The court instructs the jury that the law of this state requires that upon state highways upon which have been constructed paved or hard-surfaced roads having two traffic lanes, any person operating or driving a vehicle shall, whenever practicable, keep to the right of the center line of the paved or hard-surfaced portion, and shall have the right of way there.<sup>35</sup>

#### § 454. — Curves and hills.<sup>36</sup>

##### California.

The driver of an automobile should reasonably regulate the operation of his vehicle in accordance with surrounding conditions so as to avoid accidents, when a clear and unobstructed view is not afforded.

When the vision of the driver of an automobile is obscured by a hill or swale so that he has no clear or unobstructed view of the highway, the speed of his automobile should be regulated in the same manner as though his view were obstructed by any other obstacle.

When the vision of a driver is obstructed either by curves in the highway or by the presence of a hill or other obstacle, he should regulate the control of his vehicle accordingly. He should anticipate the possibility of approaching automobiles beyond the point of his vision.<sup>37</sup>

<sup>33</sup> Sumner Co v Fisher, 28 Oh App 219, 162 NE 639 IllApp 57

<sup>36</sup> See also §§ 330, 346, *supra*.

<sup>34</sup> Young v Snyder, 28 OhApp 303, 162 NE 678

<sup>37</sup> Fleming v Flick, 140 CalApp 14, 35 P2d 210

<sup>35</sup> Barnstable v Calandro, 270

**Kentucky**

It was the duty of each driver, when approaching a curve or an obstruction to the view for a distance ahead of at least 150 feet, to have his car under reasonable control, and each keep to his right side of the road, and each give warning by horn or other device of his approach, and each to use ordinary care at all times to avoid collision [Ky Rev Stat, § 189 410]. <sup>38</sup>

**Maryland**

The court instructs the jury that under the law all vehicles, when being driven upon the highways of this state, upon meeting others, are required to turn to the right of the center of the highway so as to pass without interference, and in rounding curves to keep as far to the right of the road as reasonably possible <sup>39</sup>

**Wisconsin**

(1) Where the view ahead is cut off or is seriously obstructed for any reason, it is the duty of the driver to slow down so as to be able to stop within the distance ahead, in which he can clearly see in front of his automobile, or to take such other precautions by giving signals, as an ordinarily prudent operator usually takes under the same or similar circumstances <sup>40</sup>

(2) It was his duty to keep a careful lookout in the direction in which he was proceeding, and to observe the condition of the roadway and the curve in the road, and to so operate and restrain the speed of his car, and so maintain control of it that he would not endanger the property, life or limb of any person. If he did not do this, because he was not giving his due attention to the driving of the car and he thereby lost control of his car, and brought about the accident, then you should find that inadvertence and lack of attention of the defendant, and not his lack of skill, produced the overturning of the car. <sup>41</sup>

**§ 455. — Bridges. <sup>42</sup>****Missouri**

The court instructs the jury that if you find and believe from the evidence that on January —, 19—, plaintiff was riding in the automobile mentioned in the evidence, and that it was

<sup>38</sup> Berryman v Worthington, 240 Ky 756, 43 SW2d 5

<sup>39</sup> Cumberland & Westernport Transit Co v Metz, 158 Md 424, 149 A 4, 565

<sup>40</sup> Dormeyer v. Hall, Circuit

Court Vilas County, Wisconsin, see 192 Wis 197, 212 NW 257

<sup>41</sup> Thomas v Steppert, Circuit Court, Marathon County, Wisconsin, see 200 Wis 388, 228 NW 513

<sup>42</sup> See § 347, *supra*



driven by her husband in a southwardly direction along and upon Gravois Avenue and River Des Peres Bridge, mentioned in the evidence, on the right-hand side thereof, and that while plaintiff's husband operated said automobile, as aforesaid, the defendant, at said time, operated his automobile in a northwardly direction along and upon said street and bridge, and that said automobiles then and there came into violent collision, and if you further find and believe from the evidence that as defendant's automobile approached the said automobile in which plaintiff was riding, coming from the opposite direction, that the defendant's automobile was traveling on the west or left-hand side of said roadway and toward the automobile plaintiff was riding in, and if you further find that said defendant then and there failed and omitted to turn his said automobile to the right of the center of said roadway so as to pass the said automobile in which plaintiff rode without interference after the defendant saw, or by the exercise of the highest degree of care could have seen, said automobile in which plaintiff was riding, approaching on said roadway, in time to have so turned and passed said automobile of plaintiff without interference, if you find he could have done so, then if you so find the facts to be, the court instructs you that the defendant was guilty of negligence, and if you further find that such negligence, if any, of defendant directly caused or contributed to cause said automobiles to come into violent collision, and that plaintiff sustained injuries as a direct result of said collision, then plaintiff is entitled to recover in this action

The court instructs you that if you find and believe from the evidence that at the time mentioned in the evidence, plaintiff was riding in the automobile mentioned in the evidence, and that said automobile was being driven southwardly along the west or right-hand side of the roadway of the bridge mentioned in the evidence, and that the defendant's automobile then and there approached from the opposite direction on his left-hand side of said roadway, and in the path of and toward the said automobile plaintiff was in, and that directly due thereto the plaintiff and her husband became and were in imminent peril and danger of being injured by defendant's said automobile, and that plaintiff and her husband believed they were in peril and danger of injury, then it was the right and duty of plaintiff's husband to drive the automobile he and plaintiff were in, to such place on the highway as a person, in the exercise of due care, would have done, under the circumstances, to avoid injury to himself and others; and if you further find and believe from the evidence that the plaintiff's husband did

then and there drive said automobile in which plaintiff rode from a position near the right-hand curb of said roadway of said bridge, and out of the path of defendant's said automobile, and at said time he was exercising due care to avoid a collision between said automobiles, and injury to himself and others, and if you find that thereafter the defendant swerved his automobile toward and into the said automobile in which plaintiff rode, and if you find that in so doing, said defendant failed to exercise the highest degree of care and was negligent, and that directly due to such negligence, if any, said automobiles came into violent collision, and directly caused the plaintiff to be injured, then your verdict will be in favor of plaintiff and against defendant <sup>43</sup>

#### Wisconsin

You will bear in mind the place where the collision occurred, the opportunity, or lack of opportunity which the defendant had to see conditions ahead of her, the opportunity or lack of opportunity which she had to see or otherwise know of the approach of the G car, the nature of the bridge which she was approaching and of the road on which she was proceeding, and all other such circumstances, and bear in mind the rule as to rate of speed permitted, which I have just given you, and you are here to say whether the defendant failed to use ordinary care in proceeding as she did to the point of collision <sup>44</sup>

#### § 456. — While or after overtaking and passing another vehicle. <sup>45</sup>

##### Federal

##### Texas

If you find and believe from the evidence that at the time of the collision in question, the plaintiff was attempting to pass a vehicle proceeding in the same direction and ahead of the plaintiff, at the same time such vehicle and the vehicle of the defendant were meeting and passing each other, such act in itself constitutes contributory negligence. In that connection, if you find and believe that at the time of the collision the plaintiff was attempting to pass a motor vehicle, which vehicle was in front of the car of plaintiff at the same time that said motor vehicle in front of the car of plaintiff was meeting and passing the vehicle of the defendant, and you believe that such act of the plaintiff contributed to cause the injuries complained of by

<sup>43</sup> King v. Friederich (MoApp),  
43 SW2d 843

<sup>44</sup> Knutson v Fenelon, Circuit

Court, Oneida County, Wisconsin,  
see 200 Wis 261, 227 NW 857

<sup>45</sup> See also § 461, *infra*

the plaintiff, or concurred with or cooperated with the negligence of the defendant, if any you have found, in producing or bringing about the injuries complained of by plaintiff, then you will find for the defendant <sup>46</sup>

#### Idaho

You are instructed that it is the duty of the driver of an automobile to exercise, at all times, care in the operation of said vehicle. This means care to have her car under control and on the proper side of the road when meeting or overtaking other cars so as to prevent a collision. <sup>47</sup>

#### Kentucky.

It frequently becomes necessary for a motorist to pass another going in the same direction. This is particularly true of buses that operate on a fixed schedule. In such a case the proper method to pursue is for the driver of the vehicle following another to pull out to the left so that his view may be unobstructed. If it then appears that there is no car approaching so near as to make it dangerous to pass, he may sound his horn and make the attempt. If, however, after he begins the attempt to pass, it becomes reasonably apparent to a driver of ordinary prudence in his situation that the approaching car is so near, or is traveling at such a high rate of speed as to make it dangerous to continue the attempt, he should slacken his speed and use ordinary care to get over on the right-hand side of the road and fall in behind the car in front. But the failure of the passing motorist to perform any one of these duties will not absolve the driver of the approaching car from all responsibility. He is charged with keeping a lookout, and when the danger of a collision becomes apparent, if a passing motorist persists in his effort to pass, or decides to give up the attempt, and fall back in the rear of the car in front, he should reduce his speed, have his car under reasonable control, and use ordinary care to avoid an accident. He may not go forward at such a high rate of speed as to make it impossible to prevent a collision, and then lay the entire blame on the passing motorist. <sup>48</sup>

#### Oregon

Driving upon the left side of a public highway, in order to pass another car going in the same direction, in itself is not negligence. <sup>49</sup>

<sup>46</sup> Sun Oil Co v Gregory, 56 F2d 108

<sup>47</sup> French v Tebben, 53 Idaho 701, 27 P2d 474

<sup>48</sup> United Coach Corp v Finley, 243 Ky 658, 49 SW2d 544 See

also Kennedy Transfer Co v Greenfield's Admr, 248 Ky 708, 59 SW2d 978

<sup>49</sup> Turner v McMillan, 140 Or 407, 14 P2d 294 See also Goebel v Vaught, 126 Or 332, 269 P 491

§ 457. —Automobiles crossing — intersections — right of way.<sup>50</sup>

Alabama.

I charge you, gentlemen of the jury, that if you are reasonably satisfied from the evidence in this cause that the street along which defendant was driving at the time of the collision had been designated by an ordinance of the city of Birmingham as a boulevard or through highway, then it would be negligence as a matter of law to drive into same from an intersecting street without coming to a full stop

I charge you, gentlemen of the jury, that the law requires one entering a public street designated by an ordinance of the city of Birmingham as a boulevard or through highway, to stop before so doing, and it is, as a matter of law, negligence merely to slow up, but not come to a complete stop, before entering same.<sup>51</sup>

Arizona

You are further instructed that if the driver of the car, G, approached the intersection of said roads and observed the traffic and observed the defendant, C, approaching the intersection, and if you believe that before entering upon the intersection after having observed the stop sign that he exercised that judgment and care which an ordinarily prudent person would have exercised under similar circumstances in entering upon the intersection, and in good faith believed that he had time to clear the intersection by the time the defendant reached it, if traveling at a lawful rate of speed, then I charge you that the driver, G, was not guilty of negligence in entering upon the intersection at that time and place<sup>52</sup>

Arkansas

(1) The court instructs the jury that where two vehicles approach or enter an intersection at approximately the same time, the one on the left shall yield the right of way to the vehicle on the right, but, however, where one vehicle has already entered the intersection and the other vehicle has not, then the former vehicle has the right of way over the latter<sup>53</sup>

(2) If you find from the evidence that as Mrs D approached the intersection, she stopped at the stop sign, and you further

<sup>50</sup> See also §§ 350, 376, 388, *supra*

<sup>51</sup> Titus v Bradfoot, 226 Ala 21, 145 S 423

<sup>52</sup> Chapman v Salazar, 40 Ariz 215, 11 P2d 613

<sup>53</sup> Murray v Jackson, 180 Ark 1144, 24 SW2d 960 See also Jacks v Culpepper, 183 Ark 505, 37 SW2d 94

find that at the time P. H. was nearing the intersection and was in such close proximity thereto as to constitute an immediate hazard, and you further find that H. was in plain view of any person making a reasonable use of his eyesight and situated as was Mrs. D. at the time, and she had no right to continue into the intersection in front of the approaching truck, and if she did so, and she was injured, she is not entitled to recover damages herein, and your verdict will be for the defendant.<sup>54</sup>

#### California

(1) Right of way is defined by the law to be the right to the immediate use of the highway and certain rules have been laid down as to which of two or more vehicles has the right of way under certain specified conditions, before the driver of any vehicle is entitled to the right of way, such driver himself must be operating his vehicle within the law and not in violation thereof, and no operator of any vehicle has the right of way at a time when he himself is violating the law<sup>55</sup>

(2) I charge you that, if the plaintiff, Mrs. B. M. D., in this action, at the time of the accident upon which this action is based was approaching or entering upon an intersection of the public highway, and if at said time she failed to look or looked and failed to see whether it was safe for her to drive her vehicle upon and across such intersecting highway, and if you find that such failure on the part of the plaintiff to look or to see the condition of the intersecting highway substantially contributed to the cause of the accident, then said plaintiff was guilty of contributory negligence and your verdict must be for the defendant<sup>56</sup>

(3) Where a car has actually entered an intersection before the other approaches it, and when the other car does not constitute an immediate hazard, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger or collision. He has the right to assume, until the contrary appears, that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision<sup>57</sup>

(4) You are instructed that plaintiff had a right to assume that any person driving in a southerly direction on Cole Street

<sup>54</sup> *Menser v Danner* 219 Ark 130, 240 SW2d 652

<sup>55</sup> *Hayes v Emerson*, 110 CalApp 470, 294 P 765

<sup>56</sup> *Daniel v Asbill*, 97 CalApp 731, 276 P 149

<sup>57</sup> *Cook v Ross*, 134 CalApp2d 202, 285 P2d 25

would drive on the westerly side of said Cole Street across the intersection, and that no vehicle would approach her from the left at a time when her car was beyond and to the east of the medial line of Cole Street. This, of course, does not mean that any driver of an automobile has a right to proceed blindly and in disregard of danger which is obvious or which, by the exercise of ordinary care could be obvious, because it is at all times the duty of each person to exercise ordinary care, and this is true even though the negligence of another person caused the danger. It is for you to determine, of course, as I have repeatedly advised you, the facts of the case. It is for you to say whether the car of the plaintiff passed the medial line at the time of the asserted collision <sup>58</sup>

#### Colorado

The one having the right of way is not absolved from reasonable care. <sup>59</sup>

#### Connecticut.

(1) If, because of traffic conditions on Chapel Street, there was more danger of accidents from collision, then the defendant's servant owed the plaintiff, and other persons traveling on Chapel Street, a corresponding degree of care in driving onto Chapel Street from High Street <sup>60</sup>

(2) The driver of an automobile approaching a street intersection must give to another, approaching the intersection from his right, the right to cross the intersection before him if a man of ordinary prudence in his situation, in the exercise of due care, would reasonably believe that if the two automobiles continued to run at the rate of speed at which they were running, such continuance of their course would involve the risk of a collision. In such case they were arriving at such intersection at approximately the same instant <sup>61</sup>

(3) And so, where the car on the left reaches the intersection before the car on the right, and passes a considerable distance through the intersection before the car on the right reaches the intersection, and the driver of the car on the left, acting as a reasonably prudent person under the circumstances has no reason to believe that he cannot pass in front of the car on his right without risk of collision, then the driver of the car on the left, being within and a considerable distance through the

<sup>58</sup> Kirschbaum v McCarthy (Cal App), 47 P2d 345

<sup>59</sup> Golden Eagle Dry Goods Co v Mockbee, 68 Colo 312, 189 P 850

<sup>60</sup> Brown v New Haven Taxicab

Co, 93 Conn 251, 105 A 706 See also Wing v Eginton, 92 Conn 336, 102 A 655

<sup>61</sup> Hall v Root, 109 Conn 33, 145 A 36.

intersection, has the right to proceed, and it is the duty of the driver of the car on the right to operate his car as to enable the car on the left to pass safely through the intersection.<sup>62</sup>

#### Florida.

A person operating a vehicle along a roadway in compliance with the law has a right to assume that the person operating a vehicle upon an intersecting street will observe the rules of the road, will obey the laws governing the operation of automobiles and that such approaching driver will exercise due care to avoid an accident, and he has a right to act upon this assumption, and if such motorist has the right of way under the law and circumstances of the case, he has the right to assume that the approaching motorist on the intersecting street will yield the right of way to him, and it would not be contributory negligence on his part to act on such assumption in proceeding into the intersection, unless and until he became aware of the fact that such right of way would not be given, and unless he then had a clear opportunity to act in such emergency to avoid the collision after the emergency arose<sup>63</sup>

#### Georgia

The driver having the right of way at a highway intersection ordinarily has the right to assume, and to act upon the assumption, that drivers of cars approaching the crossing on his left will yield the right of way, and also that they will exercise the ordinary care required of them. But, even though a driver on the left has failed to observe a right of way statute, and is thus guilty of negligence per se, or has otherwise failed to exercise ordinary care in approaching the intersection, this will not render such a driver liable for a collision, unless such negligence proximately contributed to the collision. Such negligence of a driver approaching on the left will not relieve the driver having the right of way of his own legal duty to exercise ordinary care under the facts and circumstances of the situation. His right of way and right to assume the absence of negligence by others do not entitle him to drive blindly or recklessly across an intersection without regard to the conditions and consequences. It is his own duty to exercise ordinary care in being alert to observe vehicles approaching the crossing, and to exercise ordinary care in the control, speed, and movements of his car to avoid a collision, after he sees or by

<sup>62</sup> *Prato v Coffey*, 135 Conn 445,  
66 A2d 113  
In the case cited the traffic light

was fixed at "caution"

<sup>63</sup> *Kerr v Caraway* (FlaSupCt),  
78 S2d 571.

ordinary diligence could have seen that one is threatened or imminent <sup>64</sup>

#### Idaho

The jury is instructed that the term "right of way" as used in the law means the privilege of the immediate use of the intersection. The privilege is not exclusive but relative, and the right to exercise it depends upon the circumstances in each particular case. The right of way granted by law to vehicles on the right at highway intersections has no proper application except where the vehicles on intersecting highways approach the intersection so nearly at the same time and at such rates of speed that, if both proceed, each without regard to the other, a collision between them is reasonably to be apprehended. In such a case, it is the right of the one having the right of precedence to continue his course, and it is the duty of the other to yield him the right of way. <sup>65</sup>

#### Illinois

(1) The court instructs the jury that under the statute of Illinois and the ordinance of the city of East St. Louis, in force at the time of the collision in question, unless you believe from the evidence that there were circumstances justifying other action, it was the duty of the driver of the automobile going north on Fourteenth Street when approaching Summit Avenue to give the right of way to the driver of the automobile driving west on Summit Avenue, and approaching the intersection with said Fourteenth Street, if you believe from the evidence that the two automobiles were reaching the intersection of said streets at approximately the same time <sup>66</sup>

(2) If you find from the evidence, under the instructions of the court, that the automobile of the defendant was proceeding in a southerly direction along Ridgeland Avenue, and that the automobile of the plaintiff was proceeding in a westerly direction along Washington Boulevard, and that as the defendant's automobile was proceeding in a southerly direction along Ridgeland Avenue and approaching said Washington Boulevard, said automobile of the defendant was in full view of the plaintiff, and would reach Washington Boulevard at or before the time plaintiff's automobile would reach said intersection, the court instructs you, as a matter of law, that, under the circumstances, it was then and there the duty of the plaintiff to cause his automobile to stop or slow down so as to permit

<sup>64</sup> Eddleman v Askew, 50 GaApp Mach Co, 48 Idaho 310, 282 P 72  
540, 179 SE 247 <sup>65</sup> Geschwinder v Comer, 222 Ill

<sup>66</sup> Faris v Burroughs Adding App 417



the automobile of the defendant to proceed across said intersection.<sup>67</sup>

Indiana.

As between the parties to this action, the one reaching the highway intersection first had the right of way<sup>68</sup>

It is the statute law of this state that every motor vehicle traveling upon any public highway shall give the right of way to any other motor vehicle approaching along an intersecting highway from the right, and shall have the right of way over these vehicles approaching along an intersecting highway from the left.

But the court instructs you that the right of way given to the traveler approaching from the right is not an absolute one under all conditions, neither is the fact of which driver arrives first at the intersection of the streets necessarily of controlling influence, under all conditions. This statute was enacted as a safety measure to guard against the danger of collision between automobiles at intersecting highways. Therefore, both drivers should exercise reasonable care to avoid coming into collision, and if a driver who is approaching a highway intersection, even though he has the right of way, sees a vehicle approaching on his left and near enough so that there is a reasonable probability that a collision will occur if both proceed, then it is the duty of such driver to exercise reasonable care to yield the right of way to the one approaching on his left in order to avoid a collision. In other words, it is the duty of a driver of an automobile on approaching a street intersection to use reasonable care to discover whether or not there is any automobile approaching such intersection either from his right or from his left. And even though he may have the right of way, it is still his duty to use reasonable care to avoid coming into collision with another automobile approaching his left, and if he fails to do so, and a collision occurs by reason of such failure, such driver is guilty of negligence.

I instruct you that a person driving an automobile on a public highway must use ordinary care to avoid coming into collision with other vehicles. The quantum or amount of care may vary with the surrounding circumstances. If you find from a preponderance of all the evidence that a collision occurred between the automobiles driven by the plaintiff and by defendant, D F W, at the intersection of two intersecting highways as

<sup>67</sup> Schwartz v Lindquist, 251 Ill App 320

<sup>68</sup> Keltner v Patton, 204 Ind 550, 185 NE 270

charged in the complaint, if you find these to be the facts, and if you further find that by reason of the physical surroundings at such intersection, the view of each driver as to the approach of the other was partly obstructed so that they could not see each other until they were in close proximity of said intersection, then under such circumstances, if so you find them, it was the duty under the law of each driver to have his automobile under control, and failure on the part of either driver to have the automobile under control under such circumstances, constitutes negligence on the part of such driver <sup>69</sup>

#### Iowa

You are instructed that drivers of motor vehicles upon the streets of the city have the right to presume that other persons also driving upon the streets of the city will not violate the law, but will observe the rules of the road as prescribed by law, and in this connection you are instructed that a person approaching an intersection, observing due care on his own part, has the right to assume that a person approaching from his left will observe the rule of law and yield the right of way to him

You are instructed that it is the law of this state that where two vehicles are approaching an intersection of any public street or highway, so that their paths will intersect, if there is danger of a collision, the vehicle approaching the other from the right shall have the right of way

You are further instructed that the right of precedence at a crossing occasioned by such statute has no proper application except where the vehicles on the intersecting streets are approaching the crossing so nearly at the same time, and at such rate of speed that if both proceed without regard to the other, a collision or interference between them is reasonably to be apprehended. In such case it is the right of the one having the precedence to continue his course, and it is the duty of the other to yield the right of way, but if the traveler not having such right or precedence gets to the crossing and finds no one approaching upon the other street, within such distance as reasonably to indicate danger or interference or collision, he is under no obligation to stop or wait, but may proceed and use such crossing as a matter of right <sup>70</sup>

<sup>69</sup> Mitchell v Cherry-Burrell  
Corp Circuit Court, Marion County,  
Indiana No 44517

<sup>70</sup> Appleby v Cass, 211 Ia 1145,  
234 NW 477, see (IaSupCt), 229

NW 210

Instruction on Iowa law is approved in Jennings v Buirvall, 122  
Neb 551, 240 NW 757

**Kentucky**

It was the duty of the driver of the sedan, belonging to the defendant S, to yield the right of way at the intersection of said streets to plaintiff's automobile approaching from the right, unless plaintiff's automobile was further from the point of intersection of their paths than was the defendant's automobile, and it was the duty of the plaintiff to yield the right of way to defendant's car at the intersection mentioned in the evidence, unless he was equidistant or nearer the path in the intersection at the time said automobile approached said intersection, than was the automobile of the defendant <sup>71</sup>

**Michigan.**

(1) I will say in that connection that, in driving an automobile, where you come to a highway, or if you are on a state trunk line and it crosses another trunk line, where you meet and both have equal rights, the law requires that the one on the right is entitled to protection. But that does not mean that, if you see a man coming away down the highway, you must wait till he comes to the intersection, and, if you are both approaching the intersection and liable to meet at that intersection at the same time, the one on the right is entitled to protection, but it is a matter of your own good judgment, and you will be deemed negligent if you do not exercise good judgment. That applies in cases of this character <sup>72</sup>

(2) A driver desiring to cross a through or superhighway must stop, make reasonable observation for on-coming traffic, and proceed with reasonable dispatch. He must have in mind the superior rights of drivers on the through highway, that they presumably have the right of way, and that they may and do drive rapidly because they are not obliged to stop at the intersection of inferior roads. Whether a single lookout for traffic constitutes due care, and whether and how fast one shall cross, depends upon how far he can see and what he sees. The crossing is not a place for inattention or loitering <sup>73</sup>

**Minnesota**

The rule of law as given is not unyielding and inflexible, because drivers of automobiles are not justified in taking close chances. And so in this case, under the evidence you have the right to take this rule of law into consideration and apply it to

<sup>71</sup> Sharp v Rawls, 234 Ky 438, 28 SW2d 493

<sup>72</sup> Oliver v Ashworth, 239 Mich 53, 214 NW 85. See also Harris v P Koenig Coal Co, 223 Mich 683,

194 NW 511, Bunker v Reid, 255 Mich 536, 238 NW 265

<sup>73</sup> Adams v Canfield, 263 Mich 666, 248 NW 800

the evidence, but under all of the circumstances, determine the questions of negligence as they appear from the facts in the case and determine whether or not under all of the circumstances, it was the duty of the defendant B. to so yield the right of way to the defendant P. <sup>74</sup>

#### Missouri

(1) If you find that the defendant did not reach the intersection first, and that plaintiff and defendant did not reach the intersection at approximately the same time, but that plaintiff reached the intersection first, and was proceeding across the intersection before defendant reached the intersection, then defendant did not have the right of way <sup>75</sup>

(2) The mere fact that a motorist has reached an intersection first does not give him the unqualified and unconditional right to proceed across under any and all circumstances, and regardless of the conditions confronting him. The obligations of due care under the circumstances are always resting upon him, and if he fails to exercise due care commensurate with the situation, he will be convicted of negligence, notwithstanding the fact of his having reached the intersection first and his favored position to the right of the approaching car ahead of which he intends to pass. <sup>76</sup>

(3) Care and prudence demand that one who is about to drive into an intersection where there is traffic ordinarily heavy should exercise the highest degree of care before proceeding to cross. In such case, it is the duty of such person to slow down and have his car under such control that he may stop before colliding with another vehicle in the intersection <sup>77</sup>

#### Nebraska

(1) It is a rule of the road that, where two persons approach an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. Failure to do this does not, of itself, necessarily constitute negligence but is a circumstance that you may consider along with other evidence in the case in determining the question of negligence <sup>78</sup>

<sup>74</sup> Bell v Pickett, 178 Minn 540, 227 NW 854. See also Carlson v Stork, 188 Minn 204, 246 NW 746.

<sup>75</sup> Niehaus v Schultheis (Mo App), 17 SW2d 603.

<sup>76</sup> Bramblett v Harlow (MoApp), 75 SW2d 626.

<sup>77</sup> Roberts v Wilson, 225 MoApp 932, 33 SW2d 169.

<sup>78</sup> Goeres v Goeres, 124 Neb 720, 248 NW 75. See also Jennings v Buirvall, 122 Neb 551, 240 NW 757, Spittler v Callan, 127 Neb 331, 255 NW 27.

(2) The jury is instructed that the road intersection is that part of the road bounded by lines drawn across each road from one property line to the other, and what is known as the intersection is the square or oblong included in such lines. Upon approaching a highway intersection, it is the duty of the driver of a motor vehicle to look to the right and left for approaching vehicles; and it is for you to determine whether either of the parties failed to exercise due care in this regard. The driver of an automobile upon reaching an intersection has the right of way over a vehicle approaching on his left, and may ordinarily proceed to cross, but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right.<sup>79</sup>

#### New Jersey

If the automobile going west and that going north would reach the point of crossing at about the same time, or if, at the speed both were going, it should appear to the driver of the automobile going north that they would reach the point of crossing at about the same time, then it was the duty of the person going north to yield the right of way to the person going west, which would be on the right side.<sup>80</sup>

#### New York.

The fact that the driver of a car has the right of way does not excuse him from the duty of alertness, and doing what he reasonably can to avoid a crisis. He cannot close his eyes to approaching danger simply because he has the right of way.<sup>81</sup>

#### North Carolina.

Now if you find from the evidence, and by its greater weight, that as Mr. A. approached the intersection of East Fourth Street and Caswell Road, he did not stop at the "arterial highway" as provided in the city ordinance, but drove on out in the highway without stopping, then the court instructs you he was guilty of negligence, and if the plaintiff has further satisfied you, by the greater weight of the evidence, that that violation was the proximate cause or one of the proximate causes of her injury, then the court instructs you that would be actionable negligence on the part of defendant A.<sup>82</sup>

<sup>79</sup> Schrage v. Miller, 123 Neb 266, 242 NW 649

181 NYS 734

<sup>80</sup> Kemp v. Bright, 104 NJL 529, 141 A 796

<sup>82</sup> Gaffney v. Phelps, 207 NC 553, 178 SE 231. See also Goss v. Williams, 196 NC 213, 145 SE 169

<sup>81</sup> Hood v. Stowe, 191 AppDiv 614,

Ohio.

The right of way referred to by the defendant in her charge of negligence against the driver of the plaintiff's car, has been defined by the statute of Ohio, and means the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching in a different direction into its path. Now it is the general law that a vehicle shall yield the right of way at the intersection of its path and the path of another vehicle, to the vehicle approaching from the right, when there is no other provision therefor, but you will bear in mind that this is not an absolute but a relative right, and does not mean the exclusive use thereon, but preferential one. That rule, statute, or regulation only comes into play when vehicles are approaching an intersection at a lawful rate of speed and at the same distance from the intersection and under such circumstances as to make it necessary that one yield the right of way to the other to avoid collision. It is not an inflexible or absolute rule, as I have said, but it is a rule of conduct, and the driver must exercise reasonable care at all times. Now the right of way depends to some extent upon the relative position of the cars. If the driver of the car on the left first reaches the intersection and a reasonably prudent driver would be of the opinion that under all the circumstances of the case he or she could pass in safety ahead of the other car coming from the right, such driver would not be required to wait until said car had passed before attempting to cross. But upon approaching the intersection and when about to cross, each driver would be bound to observe the laws of speed and have his or her car under control, and be in the exercise of ordinary care to detect the presence of other automobiles which may be driven on the intersecting highway, and exercise the care and judgment of a reasonably careful and prudent driver under the requirements of the law and surrounding circumstances. That is, the driver should observe ordinary care. So you must consider the position of these cars as they approached this intersection, note their rate of speed and all other circumstances shown by the evidence, and then say whether under all the circumstances of the case, one driver acting as a reasonably prudent person might reasonably expect to cross in safety in advance of the other. You must determine from all the circumstances shown by the evidence who had the right of way. The drivers of the two automobiles owed to each other the reciprocal duty to act reasonably. The care of each driver must be commensurate with the danger of a collision. You will give consideration to the conduct of each driver as shown by the evidence in the light of all the surrounding circumstances. Each

driver is entitled to assume that the other will obey the rules of traffic in approaching the crossing, until he or she has knowledge to the contrary, or in the exercise of ordinary care should have<sup>83</sup>

#### Oklahoma

(1) You are further instructed in considering the question as to which of the cars, namely, the one driven by the plaintiff, A., or the one driven by the defendant, G., had the right of way in entering the intersection where the collision occurred, that it is provided by the statutes of this state, that at intersecting roads or streets vehicles approaching from the right shall have the right of way over those approaching from the left, but that in applying the rule laid down in such statute to the rights of the parties in this action, if you find and believe from the evidence in this case that the car driven by the plaintiff A, entered the intersection in question before the car driven by the defendant, G, entered such intersection, then the car driven by the plaintiff, having first entered such intersection, had the right of way over the car driven by the defendant, G, regardless of the direction either car was traveling.

In this connection you are further instructed that such right of precedence does not release the traveler or vehicle thus favored from the duty of exercising due care not to injure another at said intersection, and that it was the duty of both the plaintiff and defendant to exercise every reasonable precaution, commensurate with the apparent danger incident to crossing intersections of roads burdened with traffic, and to avoid injuries to other persons traveling upon said highways regardless of which car had the right of way.<sup>84</sup>

(2) You are instructed that The driver of a vehicle shall stop as required by the law of Oklahoma, at the entrance to a through highway, and shall yield the right of way to other vehicles which have entered the intersection from said through highway, or which are approaching so closely on said through highway as to constitute an immediate hazard, but said driver having so yielded may proceed, and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway

But this does not mean that a vehicle not having the right of way at such place must, at its peril, avoid collision with the

<sup>83</sup> Stevens v Lepley, 46 OhApp 445, 39 OLR 289, 189 NE 260

<sup>84</sup> Sinclair Oil & Gas Co v Armour, 172 Okl 442, 45 P2d 754.

vehicle having the right of way irrespective of care or negligence by either party, nor does such right of way release the vehicle thus favored from the duty of exercising due care. Both drivers must exercise every reasonable precaution, commensurate with apparent dangers incident to crossing intersections burdened with traffic to avoid injury to the persons or property on such roads or streets, regardless to which vehicle has the right of way <sup>85</sup>

#### Oregon

(1) I instruct you that the McMinnville-Dayton Road, at the time and place of the accident, was not an arterial highway, and that the said L L was not required to bring her automobile to a complete stop before entering upon and traveling across or along said highway <sup>86</sup>

(2) This right of precedence at a crossing has no proper application except where the travelers or vehicles on the intersecting highways approach the crossing so nearly at the same time and at such rate of speed that if both proceed, each without regard for the other, a collision or interference between them is reasonably to be apprehended. In such a case, it is the right of the one having the precedence to continue his course, and it is the duty of the other to yield him the right of way. But if a traveler not having such right of precedence comes to the crossing and finds no one approaching it upon the other highway within such distance as reasonably to indicate danger of interference or collision, he is under no obligation to stop or wait, but may proceed to use such crossing as a matter of right. <sup>87</sup>

(3) Of two automobiles simultaneously approaching a given point in a street intersection, the one approaching from the right has the right of way regardless of which automobile first entered the intersection. By "simultaneously approaching" is meant approaching at such speeds and from such distances that they will reach the same spot at the same time.

If you find, therefore, that the automobiles of plaintiff and defendant were simultaneously approaching the point where they later collided, you are instructed that defendant was guilty of negligence and that if such negligence contributed to and helped to cause the accident, and the plaintiff himself was

<sup>85</sup> *Lance v Smith* (OklsupCt), 306 P2d 298

<sup>86</sup> *Cockerham v Potts*, 143 Or 80, 20 P2d 423

<sup>87</sup> *Noble v Sears*, 122 Or 162, 257

P 809, see *Ramp v Osborne*, 115 Or 672, 239 P 112, *Casto v Hansen*, 123 Or 20, 261 P 428, *Cox v Jones*, 138 Or 327, 5 P2d 102



without fault, then in that event your verdict must be for plaintiff <sup>88</sup>

**Pennsylvania.**

(1) There is a statutory rule which has been alluded to by the plaintiffs, that has been enacted by our legislature, which gives a right of way, that when vehicles are approaching the intersection of two streets, at a crossing, where they arrive practically simultaneously, it gives the right of way to the man approaching the other man to the right. That is the technical legal right of way. But, in cases of this kind, while that has an influence, a strong influence, upon the consideration of judges of facts like this, who are passing upon the care and want of care of other persons, there is also the duty of the law of prudence, which is primary and above all things. Drivers, no matter whether they have the technical right of way, must drive as prudent men would drive, and it would be folly, and negligence, for a driver to insist upon his technical right of way when a prudent man would realize it would only bring danger upon himself and to other people. So that the real thing to be considered by you is the care or want of care of these people, having in view our statutory rule about approaching from the right. That is a factor in the case, but only one factor. <sup>89</sup>

(2) The act means that when two vehicles are approaching, in the sense that they both are in the process of coming near to an intersection, so that they will reach it about the same time, the one approaching from the left must wait until the one approaching from the right has had an opportunity to pass the intersection in safety, so far as the movements of the left one are concerned. It is still the law, however, that when one vehicle actually reaches an intersection of streets "substantially in advance of one approaching from the right," it has the right of way over the other vehicle coming toward the intersection, but not yet arrived, and this without reference to right or left approach. <sup>90</sup>

**South Carolina.**

If you should be approaching a crossing in the city of Sumter, and you should be at a certain distance from the crossing, and you see somebody else about the same distance from the crossing, if you have the right of way, you would have a right to assume that the other persons know you have it, and, if

<sup>88</sup> Willhite v Freed, 137 Or 1, 144 A 899  
299 P 691

<sup>90</sup> Weber v Grenebaum, 270 Pa

<sup>89</sup> Robinson v Berger, 295 Pa 95, 382, 113 A 413

you are traveling at a legal rate of speed, you would have the right to assume that they will stop and let you go by. On the other hand, if you are not the one that has the right of way, and see someone approaching at a distance from the crossing, and in your ordinary calculation—I mean in the calculation of a man of ordinary reason and prudence—you could see that you could reasonably cross without stopping, that is exactly what the law says you have a right to do; you are within your rights, unless you are acting negligently in some other way. You see these statutes, as I stated before, are predicated upon reason <sup>91</sup>

#### Texas

Where two are approaching and about to enter the intersection of two streets, drivers of automobiles approaching from the right are, under the law, entitled to the right of way and a failure of others to surrender such right of way would be negligence as a matter of law

If one approaching an intersection from the left finds no one approaching it on the other street from the right within such distance as reasonably to indicate danger of collision, he is under no obligation to stop and wait, but may proceed in the exercise of reasonable care

The law charges all persons approaching and about to enter street intersections to keep a reasonable and proper lookout, and where two are approaching and about to enter the intersection of two streets, drivers of automobiles approaching from the right are, under the law, entitled to the right of way; and a failure of the operator of the automobile on the left to surrender such right of way would be negligence as a matter of law. However, after a person has crossed into the intersection of two streets, a failure to surrender the right of way to a car approaching from the right, where such approaching car has not reached the intersection of said streets, would not be negligence as a matter of law <sup>92</sup>

#### Utah.

The court instructs you that, while the law gives to the driver of an automobile the right of way over the driver of an automobile approaching from his left at the intersection of public highways, it does not follow, as a matter of law, that, upon the happening of a collision between two vehicles at such an intersection the driver of the automobile on the left is necessarily guilty of negligence. All the facts and circum-

<sup>91</sup> Daugherty v Williams, 144 SC 437, 142 SE 722

<sup>92</sup> Jimmie Guest Motor Co v Olcott (TexCivApp), 26 SW2d 373

stances surrounding the occurrence of the accident must be considered in determining whether such operator was in fact negligent

You are further instructed that the law requires that every driver of an automobile on the public highways of the state shall have the right of way over the driver of another automobile who is approaching from the left in an intersecting highway. The meaning of this rule is that, if both drivers approached the intersection at such time and under such circumstances that, if both continued along their course, a collision would be imminent, it is the duty of the driver approaching from the left to accord the right of way to the driver who is approaching the intersection from his right.

You are instructed that the driver of an automobile approaching the intersection of public highways has a right to presume, if he has no knowledge or notice to the contrary, that the driver of an automobile approaching such intersection from his right is conforming to the law in regard to the rate of speed and manner of driving. Therefore in this case it is not sufficient for the plaintiff to show that the defendant E. H. L. attempted to cross the intersection of H Street and First Avenue ahead of the automobile driven by his daughter, C. C., but you must find, taking into consideration all the surrounding circumstances, that said E. H. L. was negligent in assuming or deciding that she could safely cross said intersection before the plaintiff's car entered the same.<sup>93</sup>

#### Vermont

(1) By way of supplemental charge, I might add that in the exercise of the care and prudence, which the plaintiff was called upon to exercise under the then existing circumstances, it was the duty, of course, of the plaintiff to make reasonable use of her senses and intelligence to discover any danger on the highway by way of approaching vehicles or otherwise. And quite naturally that duty also implied a duty to see any cars within her vision. Now, if from the evidence you find that Mrs. H. saw, or in exercising the care, prudence and diligence that a careful and prudent person was called upon to exercise at the time that she saw the M car approaching from the north before she entered the highway, and if you find that the defendant's car was in such close proximity to the driveway from which the plaintiff was about to enter Route 7, that the plaintiff could have reasonably foreseen that a collision was likely to result,

<sup>93</sup> Collins v Liddle, 67 Utah 242, 247 P 476

provided and if she continued to drive forward into the highway, then in such an event, in the exercise of the care and diligence that an ordinary careful and prudent person would exercise under like circumstances, under the law, she was required to stop, and if you find these facts to be the facts, and she proceeded upon said highway after discerning the existence of a car in close proximity without a reasonable opportunity to enter the highway without collision, then, in such event it would be negligence. But when you get through here, ladies and gentlemen, as I previously stated, the true test, and the test that you must apply, is whether the plaintiff acted as a careful and prudent person ought to have acted under like circumstances—also whether the defendant, having in mind the existing circumstances, used the care and prudence which a careful and prudent person is called upon to exercise at the time and place.<sup>94</sup>

(2) If the jury find that the two defendants, P and C., keeping the relative rates of speed at which they were traveling as they approached the intersection of the road, arrived at the intersection of the roads so near the same time that a careful and prudent man would not have attempted to cross in front of C, or if they find that C arrived at the intersection first, then it became and was the duty of defendant P. not to attempt to cross in front of C.<sup>95</sup>

#### Washington

(1) Even if you find that D stopped before attempting to cross Fifteenth Avenue in front of plaintiff's car, it was still his duty to yield the right of way to plaintiff and plaintiff had a right to assume that he would do so until the contrary was manifested by his proceeding across the avenue.<sup>96</sup>

(2) The necessity for the constant moving of traffic, and that the intersection be not blocked in either direction, requires the driver on the left to decide almost instantly whether to proceed or stop. If, acting as a reasonably prudent man, he makes such observations as he can and there is nothing to warn him that the car approaching on the right is so far exceeding the speed limit as to endanger his progress, he must necessarily proceed in order to facilitate traffic. But if, on the other hand, there is anything in the situation which would warn a reasonably prudent driver that the car approaching on the right is out of control, or is so far exceeding the speed limit as to be actually within striking distance, then it is the

<sup>94</sup> Hannon v Myrick, 118 Vt 431, 148 A 874  
111 A2d 729

<sup>96</sup> Weikert v Daniels, 178 Wash

<sup>95</sup> Jasmin v Parker, 102 Vt 405, 416, 35 P2d 22

duty of the driver on the left, notwithstanding the negligence and the violation of the law by the driver on the right, to yield the right of way in the interest of safety to all concerned

The court instructs the jury that all rights of way are relative, and the duty to avoid accidents or collisions at street intersections rests upon both drivers. The primary duty of avoiding such accidents rests upon the driver on the left, which duty he must perform with reasonable regard to the maintenance of a fair margin of safety at all times. If two cars collide within the intersection, then they were simultaneously approaching a given point within the intersection, within the meaning of the statute, unless the driver on the left assumes and meets the burden of producing evidence which will carry to the jury the question of fact as to whether or not the favored driver on the right so wrongfully, negligently, or unlawfully operated his car as would deceive a reasonably prudent driver on the left and warrant him in going forward upon the assumption that he had the right to proceed.<sup>97</sup>

(3) The state law provides that drivers, when approaching street intersections, shall look out for, and give the right of way to, vehicles on their right simultaneously approaching a given point, but it is also the law that a car, whether on the right or left, that reaches an intersection an appreciable time ahead of another car has the right of way.

I therefore instruct you that, if you find from the evidence in this case that the plaintiff's automobile reached the intersection of Second Avenue and Cedar Street an appreciable time ahead of the defendant's car, the plaintiff's car had the right of way, and it was the duty of the driver of the defendant's car to so drive said car as to accord the plaintiff the right of way, and if you further find that the failure of the defendant to accord the plaintiff such right of way was the proximate cause of the collision herein and resulting injuries, if any, to the plaintiff, your verdict should be for the plaintiff.

On the other hand, if you find from the evidence in this case that the said cars were simultaneously approaching a given point, it was the duty of the driver of the car on the left to so drive his car as to accord to the defendant's car the right of way. And if you further find that his failure to accord the defendant's car such right of way caused or contributed to cause the collision herein, then your verdict should be for the defendant.<sup>98</sup>

<sup>97</sup> *Martin v Hadenfeldt*, 157 Wash 563, 289 P 533

<sup>98</sup> *Hirst v Standard Oil Co.*, 145 Wash 597, 261 P 405

**West Virginia.**

The court instructs the jury, that under the law of the state of West Virginia, an operator of a vehicle is entitled to have the right of way over an operator of another vehicle who is approaching from the left in an intersecting highway, and is required to give the right of way to an operator of a vehicle approaching from the right of an intersecting highway; and that if they believe from the evidence in this case that the defendant M was approaching an intersecting highway on the right of the defendant C, then the defendant M. had the right of way over said intersection, and if the jury should believe that the defendant C failed to yield such right of way, but proceeded into the intersection and thereby caused the collision between his automobile and that operated by M., and that such collision was the proximate cause of the injury to the plaintiff's decedent, then the jury shall find for the defendant M., unless the jury should further believe from the evidence in this case that the defendant M was guilty of some other act of negligence which caused or proximately contributed to the said injury <sup>99</sup>

**Wisconsin**

(1) I have quoted to you the statute which provides that when two vehicles approach an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right, unless such right of way be forfeited by approaching at an unlawful rate of speed.

Vehicles must be deemed to be approaching at approximately the same time when they are so approaching that they cannot safely pass each other in the intersection if they both proceed at a lawful rate of speed across the intersection.

In order that they be not approaching at approximately the same time, they must be in such a position that, if they continue on across the intersection, each proceeding at a lawful rate of speed, they will not interfere with each other. <sup>1</sup>

(2) Every driver of an automobile at a highway crossing has the right of way over any other driver approaching him on the left. The possession of the right of way by a driver over another driver approaching from the left on an intersecting highway does not justify the possessor in plunging ahead regardless of consequences nor justify or excuse his failure to use

<sup>99</sup> Collar v McMullin, 107 WVa 410, 148 SE 496      Marathon County, Wisconsin, see 210 Wis 345, 252, 354, 244 NW 630,

<sup>1</sup> Brown v Haertel, Circuit Court, 633, 691

ordinary care to avoid injury to others. Even though a person has the right of way at an intersection, he is still obligated to exercise ordinary care for the safety of himself and others.<sup>2</sup>

(3) It appears that this collision occurred at or within an intersection of highways. You should get clearly in mind the meaning of the words "intersection of highways." In this case the intersection consisted of that square space bounded by the outer lines of each highway extended across the other. By outer lines I mean the lines dividing the highway right of way from the adjoining property, where the fence is erected, if one is built. In this case it was a square space about 50 feet square where each highway lapped across the other.

In the taking of evidence, counsel and witnesses sometimes spoke of a different intersection, namely the intersection of the roadways. That is the square about 18 feet, or a little more, on each side where the two roadways, which means the traveled part of the highways, lapped across each other.

When I use the word "intersection" in these instructions I mean that larger square about 50 feet square, constituting the intersection of the highways.<sup>3</sup>

(4) By the center of the intersection of Wilson and Butler streets is meant the point where the center line of Butler Street—that is, a line drawn parallel to the curbs of Butler Street and half way between those curbs and extended across Wilson Street—meets a similar line drawn along the center of Wilson Street parallel to the curbs of Wilson Street and half way between such curbs. It does not mean a point on a line drawn across from the end of the sidewalk or any part of the sidewalk at the northeast corner of Wilson and Butler streets to the opposite corner or sidewalk of Butler, Wilson, and King streets.<sup>4</sup>

(5) In connection with this question [the negligence of W. H.], you are instructed that as he approached and entered the intersection in question, W. H. was entitled to assume that the operator of any vehicle approaching the intersection would comply with the law relating to the operation of motor vehicles and would exercise ordinary care. He was entitled to rely on this assumption until he knew or in the exercise of ordinary care should have known that the driver of an approaching vehicle was not complying with the law or exercising ordinary care.

Among other things, W. A. was entitled to take into con-

<sup>2</sup> *Dav v Pauly*, 186 Wis 189, 202 NW 363

<sup>3</sup> *Brown v Haertel*, Circuit Court, Marathon County, Wisconsin, see

210 Wis 345, 352, 354, 244 NW 630, 633, 691

<sup>4</sup> *Stewart v Olson*, 188 Wis 487, 206 NW 909, 44 ALR 1292

sideration the fact that he was driving on an arterial highway and that all vehicles entering upon the highway he was driving on were required to stop and yield the right of way to traffic on the arterial, and he was entitled to assume that the driver of any car entering the arterial would comply with his duty in respect to stopping and yielding the right of way and to rely on this assumption until he knew or in the exercise of ordinary care should have known that the approaching driver was not fulfilling his duty <sup>5</sup>

(4) If S was in the intersection first, he had the right to assume that the deceased would yield him the right of way, and that he had the right to assume that the deceased would yield it until he could or should have seen that he would not do so <sup>6</sup>

#### § 458. —Speed and control. <sup>7</sup>

##### Alabama.

The court charges the jury that under the law it was the duty of the plaintiff, on approaching the intersection of the road where the accident or injury is said to have occurred, to have his motor vehicle under such control that he could have stopped the same within a reasonable distance <sup>8</sup>

##### Arizona.

If you believe from the evidence in this case that the defendant was operating his car at that time and place at an excessive rate of speed, a rate of speed in excess of 25 miles an hour, in approaching said intersection, to-wit, 40 to 50 miles an hour, then I charge you that he was guilty of negligence in so operating said car upon said highway <sup>9</sup>

##### Arkansas

(1) Drivers of automobiles in approaching street crossings or an intersecting street must have their automobiles under control, prepared to stop if automobiles or other vehicles or pedestrians are passing over the intersection. Danger may always be expected or anticipated at street crossings or at intersections of streets, and every driver of an automobile should keep a lookout and approach same with his machine under control, else he cannot be regarded or treated as exercising ordinary care <sup>10</sup>

<sup>5</sup> Ray v Milwaukee Automobile Ins Co, 230 Wis 323, 283 NW 799

92 S 414

<sup>6</sup> Eberdt v Muller, 240 Wis 341, 2 NW2d 367, 3 NW2d 763

<sup>9</sup> Chapman v Salazar, 40 Ariz 215, 11 P2d 613

<sup>7</sup> See also §§ 344, 350, 381, 386, *supra*

<sup>10</sup> Smith Arkansas Traveler Co v Simmons, 181 Ark 1024, 28 SW2d 1052

<sup>8</sup> McCaa v Thomas, 207 Ala 211,



(2) If you find that the brakes were defective, and by reason thereof the employee of defendants was unable to stop the car or reduce its speed in time to prevent the injury, and that the defendants or their employee knew of such defective condition of the brakes or by the exercise of ordinary care could have found it out, then you are instructed that the plaintiff is entitled to recover for any injury that resulted by reason of any such defective condition of the brakes, provided he was exercising reasonable care for his own safety.<sup>11</sup>

**California.**

(1) If plaintiff approached and crossed the intersection in excess of the legal speed, he was guilty of negligence per se.<sup>12</sup>

(2) If you find from a preponderance of the evidence that plaintiff was guilty of violating the speed limit in traversing the intersection, he would not be precluded from a recovery merely by reason of such violation unless you further found that such violation, if any, proximately contributed to the collision, or was one of the proximate causes of the collision; and even if he was exceeding the speed limit in traversing the intersection, unless such excessive speed was one of the proximate causes of the collision, he was not precluded from a recovery.<sup>13</sup>

**Colorado.**

The driver on the left is entitled to assume that the car on his right is not approaching at a negligent rate of speed.<sup>14</sup>

**Connecticut.**

(1) The driver of an automobile approaching a street intersection must give to another, approaching the intersection from his right, the right to cross the intersection before him if a man of ordinary prudence in his situation, in the exercise of due care, would reasonably believe that if the two automobiles continued to run at the rate of speed at which they are running, such continuance of their course would involve the risk of a collision. In such case they are arriving at such intersection at approximately the same instant.<sup>15</sup>

(2) In order to render H. liable, his conduct must have been, not only negligent, but also a proximate cause of the collision. If S's rate of speed or other conduct was such that the collision would have occurred, whether or not H. had stopped

<sup>11</sup>Cox v Divine, 187 Ark 1162, 63 SW2d 982

<sup>12</sup>Gutter v Niesley, 1 CalApp2d 69, 36 P2d 155. See also Hayes v Emerson, 110 CalApp 470, 294 P 765

<sup>13</sup>Silveira v Siegfried, 135 Cal App 218, 26 P2d 666

<sup>14</sup>Golden Eagle Dry Goods Co v Mockbee, 68 Colo 312, 189 P 850

<sup>15</sup>Hall v Root, 109 Conn 33, 145 A 36

and then started as he did, or if H had proceeded far enough across the street so that S, had he been traveling with proper speed and control, could have passed to his right and in the rear of H's car without colliding with it, such speed or lack of control could well be regarded as the proximate cause of the collision, rendering S solely liable.<sup>16</sup>

#### Georgia

The law requires the operator of a motor vehicle to reduce speed at crossing or intersection of highways.<sup>17</sup>

#### Indiana.

It was the duty of the plaintiff upon approaching Central Avenue to look out for vehicles that might be passing on said avenue, and to have his own machine under such control that he could stop if necessary to avoid a collision, and if the accident in this case was partly due to the fact that the plaintiff was unable to stop, after he should have discovered the approaching automobile of this defendant, then he was guilty of such contributory negligence that he cannot recover in this action.

A certain city ordinance has been introduced which gives to automobiles traveling north and south, at the place in controversy the right of way over those traveling east and west. I instruct you, however, that such ordinance does not in any way operate to relieve one going north and south of the duty to keep within the rate of speed prescribed by law, and any excess of such speed if you find there was such excess, is a prima facie case of negligence, regardless of the ordinance giving such traffic the right of way. Nor does the right given under such ordinance excuse the defendant from the duty of exercising reasonable care under all the circumstances, in the avoidance of the accident referred to in this case.<sup>18</sup>

#### Iowa

You are instructed that if the driver of an automobile in approaching a street intersection observes a car at such distance that if, in the exercise of ordinary prudence he believes that he can safely cross, and in undertaking to do so, a collision occurs, his failure to judge correctly the speed of an approaching car would not constitute negligence, if, in approaching or attempting to cross the highway, he used such ordinary care and

<sup>16</sup> Sutton v Hauk, 108 Conn 9,  
142 A 385

<sup>17</sup> Pettv v Moore, 43 GaApp 629,  
159 SE 728

<sup>18</sup> Lazov v Eastman, Circuit  
Court, Marion County, Indiana, No  
31483

prudence as a reasonably careful and prudent person would use under like or similar circumstances <sup>19</sup>

#### Maryland

If the car approaching from the left was actually crossing the street intersection at a time when the car approaching from the right was at such a distance from the intersection that its movement could not reasonably be supposed to create any danger that the two cars would collide, then the driver of the car proceeding from the left was not required to wait until the other car had passed, and if the operator of that car drove it at an unlawfully high and unexpected rate of speed over such intervening distance and against the car already on the crossing, thereby causing the accident complained of, the plaintiff is entitled to recover, unless he contributed by his own negligence to the injuries for which he sued <sup>20</sup>

#### Massachusetts.

There is another matter I think I should clear up. I said to you there was this statute [M G. L. A., c. 90, § 17] about slowing down, or, rather, not going more than 15 miles an hour approaching an intersecting way. I should have read the statute to you, because I overlooked for the moment the fact that that only applies where the driver's view of the road traffic is obstructed. You will take into consideration the evidence as to the situation and surroundings there. If C's view at that point was obstructed, then he was required to observe the statute. If it was not, with respect to the location of houses and buildings and things of that kind, then that statute does not apply, the provision being to enjoin upon the drivers of motor vehicles their slowing down to at least 15 miles an hour when their view of the traffic is obstructed. If the view was obstructed, then the rule applies, and if there was a violation of it, then there is evidence of negligence. If the view was not obstructed, then the rule does not apply, and it is out of the case entirely. <sup>21</sup>

#### Michigan.

(1) The law also provides, in traversing intersections, that the person operating a motor vehicle shall have it under control and operate it at such a speed as is reasonable and proper, having regard to the traffic on such highways and the safety of

<sup>19</sup> Appleby v Cass, 211 Ia 1145, 234 NW 477, see (IaSupCt), 229 NW 210

Ice Cream Co v Bach, 161 Md 285, 157 A 277

<sup>20</sup> Taxicab Co v Ottenritter, 151 Md 525, 135 A 587. See also Jersey

<sup>21</sup> Ponticelli v Cataldo, 255 Mass 473, 152 NE 81

the public. These parties in this case are both held to the same rule of reasonable and proper care and control of their automobiles, considering the traffic and character of the corner and the safety to themselves and the safety to others, with the exception that the man on the right has the legal right of way, as I have explained, but that does not militate or mitigate against the necessity of exercising reasonable and proper care and having the automobile under proper control <sup>22</sup>

(2) A driver desiring to cross a through or superhighway must stop, make reasonable observation for oncoming traffic, and proceed with reasonable dispatch. He must have in mind the superior rights of drivers on the through highway, that they presumably have the right of way, and that they may and do drive rapidly because they are not obliged to stop at the intersection of inferior roads. Whether a single lookout for traffic constitutes due care, and whether and how fast one shall cross, depends upon how far he can see and what he sees. The crossing is not a place for inattention or loitering.

A rate of speed on a through highway of 45 or more miles per hour is not illegal nor excessive nor uncommon. It is quite ordinary. A driver desiring to cross such road must anticipate fast traffic on it, and, when the range of his vision is limited, he cannot always assume that a single observation will disclose the situation and all of its probabilities and proceed as though there were no cars on the road within colliding distance. On the other hand, he may assume that a driver on the through highway, coming into the range of vision, will discover him seasonably and take ordinary care to avoid collision <sup>23</sup>

#### Minnesota

(1) If the defendant was driving at an unlawful speed, then he forfeited any right of way which he had under the statute. <sup>24</sup>

(2) The law of the road is not unyielding. It does not invariably give the vehicle to the right of the intersection the preference. Regard must be had to surrounding circumstances, and, in connection with state and municipal traffic regulations, the drivers of vehicles upon the public streets always must be mindful of the abiding rule requiring the exercise of due care to avoid collision.

The statute does not warrant drivers in taking close chances.

<sup>22</sup> Louthain v Hesse, 234 Mich 666, 248 NW 800  
693, 209 NW 138

<sup>24</sup> Johnston v Selfe, 190 Minn

<sup>23</sup> Adams v Canfield, 263 Mich 269, 251 NW 525

If the driver of an automobile approaching a street intersection sees a vehicle approaching at a fast rate of speed so that there is reasonable danger of a collision, if both proceed, then it is his duty to exercise due care so as to avoid a collision.<sup>25</sup>

#### Missouri.

(1) Care and prudence demand that one who is about to drive into an intersection, where there is traffic ordinarily heavy, should exercise the highest degree of care before proceeding to cross. In such case it is the duty of such person to slow down and have his car under such control that he may stop before colliding with another vehicle in the intersection.<sup>26</sup>

(2) The law does not impose the duty upon the driver of an automobile, upon approaching and entering an intersecting street, to stop, decrease the speed of, or change the course of, his car, merely because he sees another automobile in the street ahead of him. Such duty to act would not arise, unless the exercise of due care upon the part of the driver would lead him to believe that otherwise a collision would occur.<sup>27</sup>

#### Ohio

Of course, if the person on the left, is already in the intersection, having arrived there first, and is in the exercise of ordinary care crossing it, he has the right to go on across, and in such case, the person ordinarily having the right of way because of being on the other's right, cannot increase his speed and try to cut the other off or drive into him, but must respect the rights of the other, who got there first.

Before argument, the court instructs the jury in writing that the plaintiff has conceded in this case that R. did not reduce his rate of speed as he approached the intersection, and not until the collision occurred. The fact that R. was traveling upon the main thoroughfare, did not diminish his duty to proceed in a lawful manner and to have due regard for other vehicles upon an intersecting thoroughfare. If you find from the evidence that the conceded failure of R. [plaintiff's intestate] to reduce his speed was negligence and directly contributed in any degree toward causing the collision which ensued, then regardless of whether or not you find that Dr. O. was negligent, you will return your verdict in favor of the defendant.<sup>28</sup>

<sup>25</sup> Bell v Pickett, 178 Minn 540, 227 NW 854

<sup>26</sup> Roberts v Wilson, 225 MoApp 932, 33 SW2d 169. See also Cool v Petersen, 189 MoApp 717, 175 SW 244, Brooks v Harris (MoApp),

207 SW 293

<sup>27</sup> Stakelback v Neff (MoApp), 13 SW2d 575

<sup>28</sup> Gibert v Reardon, 46 OhApp 206, 39 OLR 336, 188 NE 359.

**Oregon**

I instruct you that the plaintiff in approaching and crossing the intersection at Front and Madison Streets, had a right to assume, unless the contrary appeared to her, that the defendant's truck was being operated at a moderate and lawful rate of speed, and that the defendant would observe the laws of this state governing automobile traffic.<sup>29</sup>

**Pennsylvania**

The duty was upon the operators of both of those vehicles, as they came up to the intersection, to keep their cars under such control that each one could do his or her duty with respect to others and take reasonable care to look out for themselves.<sup>30</sup>

**Rhode Island**

If the plaintiff, while approaching the intersection of the streets where the accident occurred, was driving his automobile at an unreasonable rate of speed, which speed contributed to the accident, he cannot recover even though the defendant was guilty of negligence.<sup>31</sup>

**Utah**

It was the duty of both parties to use such caution as a reasonably prudent person would have done in entering the intersection. The speed of the approaching automobiles, their distance from the point of intersection, the ability of the respective drivers to see, are all factors to be considered by you in determining whether plaintiff or defendant was entitled to the right of way.

It was the duty of the plaintiff to yield the right of way to the defendant as the two approached the intersection, if it would have reasonably appeared to a reasonable and prudent man under the circumstances existing and the relative speed at which they were driving that a collision was to be apprehended. If, under such conditions, the plaintiff failed to yield the right of way, and such failure on his part proximately contributed to the accident, he cannot recover.<sup>32</sup>

**Washington**

The necessity for the constant moving of traffic and that the intersection be not blocked in either direction requires the driver on the left to decide almost instantly whether to proceed or stop. If, acting as a reasonably prudent man, he makes

<sup>29</sup> Cox v Jones, 138 Or 327, 5 P2d 102

<sup>30</sup> Sema v Pettinger, 112 Pa 323, 171 A 86

<sup>31</sup> Sears v A. Bernardo & Sons, 44 RI 106, 115 A 647

<sup>32</sup> Smith v Lenzi, 74 Utah 362, 279 P 893

such observations as he can and there is nothing to warn him that the car approaching on the right is so far exceeding the speed limit as to endanger his progress, he must necessarily proceed in order to facilitate traffic. But if, on the other hand, there is anything in the situation which would warn a reasonably prudent driver that the car approaching on the right is out of control, or is so far exceeding the speed limit as to be actually within striking distance, then it is the duty of the driver on the left, notwithstanding the negligence and the violation of the law by the driver on the right, to yield the right of way in the interest of safety to all concerned <sup>33</sup>

**Wisconsin.**

(1) When each driver approaches an intersection with his car in control as it should be, and as it will be if he obeys the statutory provisions, the one who by clear margin enters the intersection first may under the rule requested rightly proceed, as he may then reasonably anticipate that the other will allow him to pass ahead. But, if the other vehicle is so close or coming at such dangerous speed that a collision is apparently likely to occur if he proceeds, he must then yield or so keep control of his car as to be able to avoid interference <sup>34</sup>

(2) Now what I said about excessive speed before, also applies to excessive speed under this question. The circumstances as to each driver were somewhat different. One was traveling on highway No. 53, intending to travel straight on that highway, without making a turn. The other was intending to make a left-hand turn. That makes a somewhat different condition. It is a circumstance. Then you will consider what position the cars were in at the time that O first indicated an intention to make a left-hand turn. Even if Z had the right of way, even if he was first in the intersection, and even if O. was negligent in driving in front of him, it was still the duty of Z to exercise reasonable care to avoid a collision. Because one driver is careless, or violates the law, does not justify another driver in being careless, or in permitting a collision if, by the exercise of ordinary care, he can prevent it. So you will consider the circumstances, and the opportunity, if any, which Z. had to stop his car, or slacken his speed so as to prevent a collision, if he had any such opportunity. Possession of the right of way does not justify the possessor in plunging ahead, careless of consequences, nor of failure to exercise ordinary care to avoid injury to others or to himself. If a driver of a car, by the exer-

<sup>33</sup> *Martin v Hadenfeldt*, 157 Wash 563, 289 P 533.

<sup>34</sup> *Roellig v Gear*, 217 Wis 651, 260 NW 232

cise of any ordinary degree of care, should have discovered that there was danger of a collision at a time when he could stop his car and avoid it, that was his duty, although he had the right of way.<sup>35</sup>

§ 459. — Traffic signs and signals in street or highway.

Federal.

New Hampshire

It was the duty of P., on approaching the stop sign, to bring his car to a full stop and to observe the conditions of traffic in both directions before entering the intersection of the highway. As to the defendant H, there is no question but that, because of the stop sign at the point of intersection with Suncook-Pittsfield Road, H had the right of way.<sup>36</sup>

Alabama.

The law requires a person entering these main highways, trunk highways of the state, to stop at that sign, and failure to stop would be negligence per se, that he was negligent.<sup>37</sup>

Missouri.

\* \* \* if you find and believe from the evidence that on the occasion mentioned in evidence, plaintiff drove and operated his vehicle into the intersection when the traffic light was green in his favor, and if you further find that prior to or after entering said intersection plaintiff, by keeping a proper lookout under the circumstances described in the evidence, could have seen defendant's automobile, if you so find, traveling westwardly in said intersection, and if you further find that plaintiff thereafter could have stopped his automobile and thus and thereby have avoided the collision which occurred, if you so find, and if you further find that plaintiff thereafter drove and operated his automobile southwardly into the path of and in front of defendant's automobile, if you so find, and if you further find that the conduct of plaintiff in the respects mentioned herein constituted a failure on his part to exercise the highest degree of care for his own safety and contributed to cause and bring about the collision mentioned in the evidence, then the court instructs you that the plaintiff is not entitled to recover in this case and you should return a verdict in favor of the defendant, whether or not you find that the defendant himself was negligent in the operation of his automobile on said occasion.<sup>38</sup>

<sup>35</sup> Zutter v O'Connell, 200 Wis 130 S 548  
601, 229 NW 74

<sup>36</sup> Higgins v Ledo, 66 F2d 265

<sup>37</sup> Harris v Blythe, 222 Ala 48,

<sup>38</sup> Witt v Peterson (MoSupCt),  
310 SW2d 857



**New York**

A failure to stop, if it was a violation of a city ordinance, is evidence of negligence, but is not negligence as a matter of law.<sup>39</sup>

**Ohio**

(1) The driver on the intersecting highway is not necessarily bound to stop nor to wait until no cars are in sight, but he or she is bound to observe the sign and then exercise ordinary care, remembering that the other party has the right of way

It is conceded in the case that there is a stop sign on the Vickery Road, one on the north and one on the south, I believe, of the intersection. And these warning signs are placed there as a warning to travelers on that road that they are coming to a main thoroughfare on which travelers have the right of way. And an ordinarily prudent person will observe the sign and act accordingly. It is his or her duty to look both ways before entering the intersection, and wait for traffic on the main thoroughfare to pass, unless the driver on the main thoroughfare is so far distant from the crossing that a reasonably prudent driver on the intersecting highway might reasonably expect to cross in safety, or unless the person on the main thoroughfare is driving at an excessive and unlawful rate of speed so that the other could not reasonably estimate the speed or make reasonable calculations of the time of his arrival at the intersection.<sup>40</sup>

(2) I charge you as a matter of law that if you should find from the evidence in this case that the bus of the defendant had entered the intersection when the light governing its movement showed green, and before the bus of the plaintiff had entered said intersection, that it was the duty of J S, the driver of the plaintiff's bus, to yield the right of way to the defendant's bus to permit it to proceed through the intersection and also to use ordinary care to avoid the collision

If you should find from the evidence in this case that the plaintiff's driver, J S, did fail to yield the right of way, if any, to the defendant's bus, or did fail to exercise ordinary care to avoid the collision, under the circumstances I have stated in this charge, and that such failure was the sole proximate cause of the collision, then I charge you that the plaintiff cannot recover from the defendant on its petition and that your verdict should be for defendant on its cross-petition against the plaintiff.<sup>41</sup>

<sup>39</sup> *Manard v Sheppard*, 243 App Div 265, 276 NYS 494

<sup>40</sup> *Gilbert v Reardon*, 46 OhApp 206, 39 OLR 366, 188 NE 359

<sup>41</sup> *Indianapolis & Southeastern Trailways, Inc v Cincinnati Street Ry Co*, 166 OhSt 310, 142 NE2d 515

**Washington**

If you find that a stop sign was erected and standing at the said alleged intersection and that said E M F, immediately preceding said collision, was aware of the presence and existence of said stop sign, or, acting as a reasonable and ordinarily prudent person under like or similar circumstances, should have been aware of the same, or should have seen said stop sign, then said E. M F would be negligent if he failed to stop at said stop sign, provided you believe that an ordinarily careful and prudent person, under like or similar circumstances, in the exercise of reasonable care, would have stopped at said stop sign.

If you believe that an ordinarily careful and prudent person, at the time and place of said alleged collision, in the exercise of reasonable and ordinary care, would have been, under like or similar circumstances, aware of said stop sign, or would have seen said stop sign and would have stopped, then the defendant P had a right to expect E M F to so stop his car and had a right to rely upon such expectation until such time as he saw, or, in the exercise of reasonable care, should have seen, that said E M F was not going to bring his car to a stop.<sup>42</sup>

**§ 460. —Horn and signals of driver.**

It is the duty of a person operating a motor vehicle in the public highway of an incorporated city to use ordinary care with reference to the control of such motor vehicle and with reference to warning signals as he approaches intersections of other highways thereon, and if the defendant in the operation of its motor-bus failed to use such care in these respects or either of them, and plaintiff's car was injured and damaged as claimed in his complaint, as a direct and proximate result of such failure, then defendant is liable to plaintiff for such injuries and damages to plaintiff's car, provided the plaintiff has proved by preponderance of the evidence that he and the person operating his car at the time and place in question were free from negligence which proximately contributed to such damage or injury<sup>43</sup>

**§ 461. Automobile following or overtaking and passing another automobile.<sup>44</sup>****California**

The court instructs you that the driver or operator of any

<sup>42</sup> *Comfort v Penner*, 166 Wash 177, 6 P2d 604

<sup>43</sup> *McCreight v Peoples Motor*

*Coach Co*, Circuit Court, Marion County, Indiana, No 39512

<sup>44</sup> See also § 456, *supra*

vehicle in or upon any public highway must drive or operate such vehicle in a careful manner with due regard for the safety and convenience of all other vehicles upon such highway, and wherever practicable shall travel on the right-hand side of such highway. Two vehicles while passing each other in opposite directions have the right of way, and no other vehicle to the rear of either of such vehicles must pass or attempt to pass such vehicles.<sup>45</sup>

**Florida.**

I charge you, gentlemen of the jury, that if you find from the evidence that the plaintiff was attempting to pass the defendant from the rear at an intersection of public streets where traffic was not controlled by an officer, or otherwise, then your verdict should be for the defendant.<sup>46</sup>

**Indiana.**

Under the law of this state, it is the duty of a person operating a vehicle on a public highway, when approaching another vehicle on such highway from the rear, to turn to the left of such other vehicle and pass such other vehicle on the left-hand side thereof, and it is the duty of the person operating the vehicle overtaken to keep the overtaken vehicle to the right-hand side of the center line of such highway while such vehicle approaching from the rear passes on the highway.<sup>47</sup>

**Maryland**

(1) The plaintiff had the right to drive upon any part of said roadbed, including the concrete shoulders thereof, and in driving on said road and shoulders had the right to change from the left to the right side thereof, or from the right to the left side thereof, so as not to interfere with traffic traveling in the opposite direction. \* \* \* There was no duty incumbent upon him, the said plaintiff, to anticipate or expect an automobile, traveling in the same direction as the plaintiff's car was traveling, to overtake the plaintiff's automobile from the rear, and pass or attempt to pass his automobile on the right side thereof.<sup>48</sup>

(2) The motor vehicle laws of the state provide that a vehicle overtaking another vehicle going in the same direction shall pass to the left of the vehicle so overtaken, provided the way ahead is clear of approaching traffic and the operator

<sup>45</sup> *Marston v Pickwick Stages, Inc.*, 78 CalApp 526, 248 P 930

<sup>46</sup> *Gosma v Adams*, 102 Fla 305, 135 S 806, 78 ALR 1193

<sup>47</sup> *Zehring v Boswell*, Circuit

Court, Marion County, Indiana, No 37669

<sup>48</sup> *Greer Transp Co. v Knight*, 157 Md 528, 146 A 851.

signals the vehicle intended to be passed by the use of his horn or other signaling device. If you find the defendant's truck overtook the plaintiff's automobile, both going in the same direction, and that the truck did not pass to the left of the plaintiff's automobile so overtaken, although the way ahead was clear of approaching traffic, and that the defendant's truck at the time of the accident was attempting to pass the automobile of the plaintiff while going in the same direction and which had been overtaken as aforesaid, if the jury so find, on the right side of the plaintiff's car, and shall further find that the failure to pass the plaintiff's car on the left side thereof and the attempt to pass the plaintiff's car on the right side thereof was the proximate cause of the accident testified to in this case, then they are instructed that their verdict must be for the plaintiff.<sup>49</sup>

#### Missouri

(1) The court instructs the jury if you find and believe from the evidence that the driver of the automobile in which plaintiff was riding did not give a warning of his intention to stop said coupe, that he was negligent in failing to give said warning that this negligence was the direct and sole cause of the collision mentioned in the evidence, then your verdict must be for the defendant, providing you further find that the defendant was not negligent in any manner in the operation of its truck.

The court instructs the jury that if you find and believe from the evidence that the driver of the car in which plaintiff was riding brought his said automobile to a sudden and abrupt stop, and that the defendant, its agent and servant, thereafter, could not by the exercise of the highest degree of care have stopped his said truck, turned the same aside, and thus and thereby have avoided striking the automobile in which plaintiff was riding, then your verdict must be for the defendant, providing you further find that the defendant was not negligent in any way in the operation of his said truck.<sup>50</sup>

(2) The court instructs the jury that if you find and believe from the evidence \* \* \* that \* \* \* plaintiff was riding in, but not driving, an automobile that was moving northwardly along and upon Missouri highway No 94, \* \* \* and while plaintiff was riding in, but not driving, an automobile on said highway, the defendant then and there was riding in and operating and driving an automobile upon and along said highway, and so managed and controlled the same as to cause the same to run into or against and collide with said automobile

<sup>49</sup> *Gleer Transp Co v Knight*,  
157 Md 528, 146 A 851

<sup>50</sup> *Geisendoif v Brashear Truck Co* (MoApp), 54 SW2d 72

in which plaintiff was riding with such force and violence as to cause the automobile in which plaintiff was then and there riding to be overturned, and so as to cause the plaintiff to suffer bodily injuries, if you so find, and if you further find that said collision and injury to plaintiff was caused by and through negligence on the part of the defendant, if you find there was such negligence, in the management and movement of his said automobile in which he was as aforesaid riding and driving in one or both of the particulars, as follows, to wit First, in attempting to pass the automobile in which plaintiff was riding and while so doing, in negligently and carelessly failing to swerve or guide his said automobile away from the automobile in which plaintiff was riding or to the left thereof, and so as to avoid colliding with and striking the automobile in which plaintiff was riding (if you find he did so fail), providing you further find defendant by the exercise of the highest degree of care could and would have so swerved or guided the same as to avoid collision with the automobile in which plaintiff was riding; or, second, in negligently and carelessly swerving his said automobile towards the right and so as to cause it to collide with the automobile in which plaintiff was riding (if you find he did so swerve it), provided you find that the defendant by the exercise of the highest degree of care could and would have avoided such swerving and collision.

And then if you further find from the evidence that the collision and injuries to the plaintiff, if any, occurred as a direct and proximate result of negligence on the part of defendant in one or both of the specifications as hereinbefore set out, then your verdict shall be for the plaintiff, and against the defendant <sup>51</sup>

(3) If you find from the evidence that plaintiff was driving his automobile, going southwardly, to the right of the center of Kirkwood Road, and, that defendant was also driving the truck, belonging to defendant, D, southwardly on said road, and that the road was clear of traffic on the east side, and that defendant, O, in attempting to pass plaintiff, negligently failed to use said portion of the road which was clear of traffic, and ran into and collided with the rear of plaintiff's automobile, and that such failure directly caused plaintiff's injuries and the damage to his car, and that plaintiff was exercising the highest degree of care for his own safety, then your verdict must be for the plaintiff and against defendant. <sup>52</sup>

<sup>51</sup> Gravemann v Huncker (Mo App), 71 SW2d 59

SW2d 448 See also Gravemann v Huncker (MoApp), 71 SW2d 59

<sup>52</sup> Berthold v Danz (MoApp), 27

(4) The court instructs the jury that if you find and believe from the evidence that at the time and place mentioned in the evidence defendant's truck, as it was going south on K. highway, was passing on the right side or to the west of an automobile which had stopped as it was going south (in the same direction) on K highway [then it was the duty of the driver of defendant's said truck to keep a careful lookout for pedestrians on said highway, and to slow down and proceed cautiously when the car ahead stopped, and it is for you to determine from all the facts and circumstances then existing, as shown by the evidence in this case, whether or not the driver of said truck was guilty of negligence. If you find and believe from the evidence that the driver of the said truck was negligent at said time and place] and if you further find and believe from the evidence that as a direct and proximate result of such negligence, if any, W. E. W. was killed, and that R. E. W. and W. G. W. were the father and mother of the said W. E. W., then your verdict should be in favor of the plaintiffs and against the defendant.<sup>53</sup>

#### Montana

The person passing is negligent if he so carelessly directs or manages his automobile that a collision results, or if he attempts to pass at a time or under conditions which are not reasonably safe.

The driver of a car overtaking and passing another must keep to the left, and not turn to the right until entirely clear of the other car, and, in overtaking another car, he is in duty bound to look out for the car ahead.<sup>54</sup>

#### New Jersey.

It is not per se negligence for one driving an automobile to attempt to pass an automobile ahead of him.

It is not unlawful for one driving an automobile to go to the left of the center of the street in attempting to pass a vehicle ahead if the roadway is not wide enough for him to remain on the right-hand side of the street in passing.<sup>55</sup>

#### New York

Plaintiff was obliged, as soon as practicable after knowing

<sup>53</sup> Willhite v St Louis, 359 Mo 933 224 SW2d 956

The case cited was an action for alleged wrongful death of a boy who collided with the defendant's truck while it was allegedly passing a stopped automobile on the right. Judgment for plaintiffs was reversed for error in instructing the jury

that the passing of the stopped car on the right would be negligence.

The instruction has been revised to conform to the court's opinion.

<sup>54</sup> McDonough v Smith, 86 Mont 545, 284 P 542.

<sup>55</sup> Tomaszewski v Schactman, 113 NJL 579, 174 A 530

of the presence of the car of the defendant, to turn and yield him the road <sup>56</sup>

**Oregon**

(1) Driving upon the left side of a public highway, in order to pass another car going in the same direction, in itself is not negligence <sup>57</sup>

(2) I further instruct you that it is the law that a driver of a vehicle shall drive the same upon the right half of the highway, and shall not drive to the left side of the center line of the highway in overtaking and passing another vehicle proceeding in the same direction, unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety. <sup>58</sup>

**Pennsylvania**

In making a pass by use of that center lane one cannot do so unless that center lane is free of oncoming traffic for a sufficient distance to be made in safety and with that, I leave the case to you. <sup>59</sup>

**Tennessee.**

And I also instruct you that before attempting to overtake a vehicle traveling in the same direction, it is the duty of the person overtaking the vehicle in front of him to see to it that such passing may be accomplished in safety for all concerned before undertaking to do so. <sup>60</sup>

**Washington.**

(1) It is the duty of the driver of the overtaking vehicle strictly to observe the law of the road, and, if plaintiff attempted to pass without so doing, he would be guilty of contributory negligence.

While the paramount duty of the driver of a motor vehicle is to keep a lookout ahead, and, while he may assume that drivers of vehicles following from the rear will observe the laws of the road, he cannot entirely ignore such vehicles. <sup>61</sup>

(2) The statute, requiring a clear view before passing an overtaken vehicle, is concerned with and relates only to the question of view, and, if the approaching driver can and

<sup>56</sup> *Gautier v Lange*, 89 Misc 372, 151 NYS 902

<sup>57</sup> *Turner v McMillan*, 140 Or 407, 14 P2d 294

<sup>58</sup> *Goebel v Vaught*, 126 Or 332, 269 P 491

<sup>59</sup> *Fleet Carrier Corp v Lahere*, 184 PaSuper 201, 132 A2d 723

<sup>60</sup> *Womac v Casteel*, 200 Tenn 588, 292 SW2d 782

<sup>61</sup> *Curtis v Perry*, 171 Wash 542, 18 P2d 840

does see clearly all that concerns his movements in passing overtaken traffic, then the statute has no application.<sup>62</sup>

(3) You are instructed that it is the duty of one operating an automobile to do so in a careful and prudent manner, and when following behind another vehicle, he should proceed at such a speed and at such a distance from the vehicle ahead as will permit him to avoid a collision in the event the automobile ahead may be required to come to a sudden stop, irrespective of whether or not the driver of the preceding vehicle gives any signal of his intention so to stop. He is bound to anticipate that the automobile or vehicle ahead might be required to stop by traffic regulations, and it is his duty to look out and be prepared for a stop on the part of the automobile ahead required by any traffic signal or regulation, and to keep at such a distance and to maintain such control of his automobile as to enable him to stop without hitting the vehicle ahead.<sup>63</sup>

#### Wisconsin

The second question is this:

If you answer "Yes" to any or all of the inquiries in the first question, then answer the corresponding inquiries here following: Was the collision between the two automobiles a natural result of defendant's negligence,

- (a) In respect to keeping a proper lookout?
- (b) In respect to his rate of speed?
- (c) In respect to attempting to pass the L. car at a road intersection?
- (d) In his choice of his line of travel?
- (e) In omitting to sound his horn?

You will notice that you are not to answer any particular inquiry contained in this question unless you first answer "Yes" to the corresponding inquiry in the first question. For example, if you answer "Yes" to the inquiry designated (a) in the first question, then you will answer inquiry (a) in the second question; but if you answer "No" to inquiry (a) in the first question then you will not answer inquiry (a) in the second question. Apply this rule wherever the question refers to answering the corresponding inquiry.

This question is simple in form. It presents the simple question whether the relation of cause and effect existed be-

<sup>62</sup> *Fawcett v. Manny*, 172 Wash 212, 19 P2d 934.

<sup>63</sup> *Jacklin v. North Coast Transp Co.*, 165 Wash 236, 5 P2d 325.



tween such negligence, if any, as you find occurred, and the collision

Negligence is a cause of a collision when it alone produces it or cooperates with some other cause in producing it jointly as a natural result

There may be more than one cause of a collision. The negligence of one person alone may produce it or the negligence of two or more persons may jointly produce it. The fact that the collision occurred is not conclusive that it was caused by negligence of any person. It might be the result of an unavoidable accident. It is for you to determine whether it was here the natural result of negligence.<sup>64</sup>

#### § 462. — Speed and control.<sup>65</sup>

##### California

It is not only unlawful for the driver of a vehicle on a public highway to fail or refuse to permit another machine operating lawfully to pass upon the giving of proper signals for that purpose, but also it is equally unlawful for the driver of the first vehicle to increase its speed until the passing vehicle is completely and safely by.

(1) It was the duty of both parties at all times to operate their machines with ordinary care and with due regard to other traffic upon the road, if the plaintiff, while driving at a lawful rate of speed, gave a signal of his desire to pass defendant's bus, and if the driver of defendant's bus heard, or by the exercise of ordinary care could have heard said signal, or if the driver of defendant's bus saw, or by the exercise of ordinary care could have seen, that the car driven by the plaintiff was about to overtake his bus, then it was his duty to give way to the right in favor of said overtaking vehicle, and not to increase his speed until completely passed by the car driven by plaintiff, and also to exercise reasonable care not to injure the plaintiff; and if defendant was negligent in that respect and such negligence was the proximate cause of plaintiff's injuries and the plaintiff was not negligent, then the plaintiff is entitled to recover.<sup>66</sup>

(2) You are instructed that it was the duty of the driver of defendant's automobile bus on the occasion involved here to anticipate that he might overtake vehicles at any point

<sup>64</sup> *Lapsenberg v. Snapp*, Circuit Court, Lincoln County, Wisconsin; see 205 Wis 681, 238 NW 289.

<sup>65</sup> See also § 379, *supra*

<sup>66</sup> *Rogers v. Interstate Transit Co* (CalApp), 284 P 499; see 212 Cal 36, 297 P 884

on the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them, and keep his machine under such control as will enable him to avoid a collision with another vehicle using proper care and caution, and if the situation requires it, he must slow up and stop. A failure, if any, on his part to use this care was negligence, and if this negligence, if any, was the sole proximate cause of the injury to the plaintiff, then you will find damages in favor of the plaintiff and against the defendants.<sup>67</sup>

#### Missouri.

The court instructs the jury that if you find from the evidence that plaintiff was driving his automobile, going southwardly, to the right of the center of Kirkwood Road, and, that defendant was also driving the truck, belonging to defendant D., southwardly on said road, and that the road was clear of traffic on the east side, and that defendant, O., negligently failed to slacken the speed of his truck or to stop his truck, but permitted said truck to collide with the rear of plaintiff's car, and that such failure to slacken the speed of said truck or to stop the same, constituted negligence, and that such negligence directly caused plaintiff's injuries and the damage to his car, and that plaintiff was at the time exercising the highest degree of care for his own safety, then your verdict must be for the plaintiff and against the defendant.<sup>68</sup>

#### Montana

It is negligence on the part of one to drive at a rapid rate of speed so close to a car ahead that, if the driver of the latter slows down, it becomes necessary for him to turn to the left to avoid striking it.<sup>69</sup>

#### Washington.

You are instructed that it is the duty of one operating an automobile to do so in a careful and prudent manner, and when following behind another vehicle, he should proceed at such a speed and at such a distance from the vehicle ahead as will permit him to avoid a collision in the event the automobile ahead may be required to come to a sudden stop, irrespective of whether or not the driver of the preceding vehicle gives any signal of his intention so to stop. He is bound to anticipate that the automobile or vehicle ahead might be required to stop by traffic regulations, and it is his duty to look out and be prepared for a stop on the part of the automobile

<sup>67</sup> Schatte v Maurice, 116 Cal SW2d 448

App 161, 2 P2d 489

<sup>69</sup> McDonough v Smith, 86 Mont

<sup>68</sup> Berthold v Danz (MoApp), 27 545, 284 P 542

ahead required by any traffic signal or regulation, and to keep at such a distance and to maintain such control of his automobile as to enable him to stop without hitting the vehicle ahead.<sup>70</sup>

§ 463. — Horn and other signals of driver.<sup>71</sup>

Indiana

If you find that the defendant, at the time and place in question, was operating his automobile upon Ludlow Avenue as charged in the complaint, and saw the plaintiff operating her automobile therein, and saw and knew that plaintiff was probably unaware of his approach, and was desirous of passing the plaintiff's automobile from its rear, and had ample time and opportunity to give plaintiff warning of his approach before so attempting to pass, or in passing, but failed so to do, then in such event, the jury may find that such failure under all the surrounding circumstances was negligence on the part of the defendant, and if such negligence proximately and directly caused the injury complained of, and the plaintiff has proved the other material allegations of her complaint, and was herself free from negligence proximately and directly contributing to her said injury, you may make your verdict for the plaintiff.<sup>72</sup>

Kentucky.

It was the duty of the driver of the defendant's car while driving immediately behind the plaintiff's car, and in reasonably close proximity to it, to use ordinary care to have said car under control and to avoid running into plaintiff's car, and it was also his duty when approaching or passing over the crest of a hill or other obstruction which obscured the view of the road to sound a timely warning of the approach of the car; and if the jury believe from the evidence that on the occasion of the injury, if any, to the plaintiff, that defendant's agent, in charge of and driving defendant's car, negligently failed to give such warning of its approach from the rear, and failed to use such care in the control and operation of said car, but negligently and carelessly ran said car into the rear of plaintiff's car, and shall believe from the evidence that the plaintiff was injured as the direct and proximate result of such negligence, if any, they will find for plaintiff the damages which they may believe from the evidence she has sustained, not to exceed \$——, the amount sued for.<sup>73</sup>

<sup>70</sup> *Jacklin v North Coast Transp Co.*, 165 Wash 236, 5 P2d 325

<sup>71</sup> See also §§ 357, 373, 385, *supra*

<sup>72</sup> *Hofmeister v. Pickett*, Circuit

Court, Marion County, Indiana, No 46659

<sup>73</sup> *Slate v Witt*, 188 Ky 133, 221 SW 217

**Michigan**

The vital or crucial negligence, if any, involved in this case, relates, not so much to the rate of speed at which the cars of the defendants were driven at the time of the accident, although the rate of speed may be incidentally involved, but rather as to whether signals were given by defendant Y as to his desire to pass the car driven by defendant F, and whether defendant F heard them or not, and whether he should or would have heard them if he had been exercising his faculties as an ordinarily careful, prudent, and vigilant person would have done under like circumstances, also whether defendant F gave the signals that he claims to have given of his intention to turn to the left at the intersection of Seneca Street and Godfrey Avenue, and whether those signals were timely and given substantially as the law requires <sup>74</sup>

**Ohio**

Plaintiff claims that the defendant, H., in attempting to pass defendant, P., and that the defendant, P., while defendant, H., was overtaking and attempting to pass him, violated various provisions of Section 4511.27, Ohio Revised Code, which, so far as applicable to this case, reads as follows [Quoting § 4511.27, R. C.].

The defendant, H., contends that he did give an audible and a visible signal by sounding his horn and flickering his lights, but that the defendant, P., did not give way to the right in favor of the defendant, H., but instead, swerved partially into the left or east lane and in front of the defendant, H. This the defendant, P., denies.

Failure of the overtaking driver to signal would be negligence per se, that is, negligence in and of itself. If an audible signal were given by the overtaking vehicle as provided by the statute, failure of the overtaken driver to give way to the right would be negligence per se, or negligence in and of itself. <sup>75</sup>

**South Carolina**

When the man behind gives a signal or warning to the man in front that he wants to pass, the business of the man in front is to turn to the right and the person following to turn to the left in order to pass <sup>76</sup>

**Washington**

The driver ahead may assume the driver in the rear will

<sup>74</sup> Greenwold v Faber, 234 Mich App 337, 143 NE2d 731  
217, 207 NW 911

<sup>76</sup> De Lorme v Stauss, 127 SC

<sup>75</sup> Raymond v Haight, 102 Oh 459, 121 SE 370

obey all proper signals given by the driver ahead and, before passing, will give timely warning of his intention so to do.<sup>77</sup>

#### Wisconsin

The statutes provide that every motor vehicle operated on a highway shall be equipped with a horn, in good working order, and it is the operator's duty, at a place like the one where this collision occurred, to give audible warning before passing or attempting to pass a vehicle proceeding in the same direction.<sup>78</sup>

### § 464. Automobiles stopping, starting, turning, and backing.

#### Alabama

The driver of an automobile when turning from one street to another has the right to presume that all other persons using the street will conform to the laws of the city, and such driver has the right to presume and act thereon, until it appears otherwise.<sup>79</sup>

#### California

(1) If the driver of defendant's truck, as he made the left turn, did not travel in the traffic lane to the right of and next to the center of the roadway, and if he failed to pass to the right of the center of the intersection, he was guilty of negligence.<sup>80</sup>

(2) I further instruct you that it was the duty of the driver of the truck in question, before turning such vehicle from Thirteenth Street into Jackson Street, to first see that said movement could be made in safety, and if it could not be made in safety, then it was his duty to stop until he could make such turn in safety.<sup>81</sup>

(3) It was the duty of the bus driver, if he intended to pass and go in front of another automobile, to wait until he could do so with safety to such automobile, and, if the jury finds from the evidence that he did not take such precautions as to protect the persons in the automobile so passed, he was guilty of negligence.

If you find from the evidence that the bus in question passed the car in which plaintiff was riding as a guest at a rapid rate of speed and suddenly stopped at an intersection close by, and without any appreciable interval of time backed suddenly

<sup>77</sup> Curtis v Perry, 171 Wash 542, 18 P2d 840

<sup>78</sup> Lapsenberg v Snapp, Circuit Court, Lincoln County, Wisconsin; see 205 Wis 681, 238 NW 289

<sup>79</sup> Karpeles v City Ice Delivery Co., 198 Ala 449, 73 S 642

<sup>80</sup> Goldhahn v Drew, 3 CalApp 2d 221, 39 P2d 279 See also De La Torre v Johnson, 203 Cal 374, 264 P 485

<sup>81</sup> Wixon v Raisch Imp Co., 91 CalApp 129, 266 P 964

against such car, causing plaintiff's injuries, and, if you further find that said act or acts were the proximate cause of plaintiff's injuries, then plaintiff would be entitled to recover such sum as would compensate him for his damage sustained thereby.<sup>82</sup>

(4) The words just quoted from the Vehicle Code, namely, that "no person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety," do not mean that the driver of a motor vehicle, before making such a turn, must know that there is absolutely no possibility of accident. They mean that before starting to turn a vehicle on a public highway, and while making the turn, the driver of the vehicle must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn can be made safely.<sup>83</sup>

Connecticut.

(1) There is not in this complaint, an allegation upon which can fairly be placed one feature in this case, which I think is very important, and which counsel on both sides have seemed to regard as an element to be considered in reaching the conclusion concerning the conduct of these several parties, and, although strictly, according to the rules which I have described to you, that might be called outside of your consideration, I think it is fair, in view of the way the case has been presented, to call your attention to another law which we have, a statute in this state, and that provides, in effect, that when any person approaches an intersecting highway he must give the right of way to any vehicle approaching from his right, providing the vehicles are arriving at the intersection at approximately the same instant.

Now, you will recall that in this case these motor vehicles were undoubtedly approaching the intersection of these roads at approximately the same instant. The plaintiff's automobile, coming up Franklin Avenue, and being about to turn into Preston Street, in the manner in which the evidence has disclosed to you, would have the motor vehicle coming down Franklin Street from Hartford upon his right hand. Therefore this provision of law would apply to the plaintiff in this case. And it was his duty to grant the right of way to any vehicle approaching from his right. It was the duty, therefore, of Mr. N., as he turned his car on Preston Street, to give the right of way to any vehicle approaching him from the direction in which this defendant's automobile was coming; or, to slow down, in the

<sup>82</sup> Caraveo v Pickwick Stages System, 113 CalApp 443, 298 P 516

<sup>83</sup> Powell v Bartmess, 139 Cal App2d 394, 294 P2d 150

circumstances before you, it was N.'s duty to give A. the right of way. Now, of course, he must do so with due respect to the circumstances surrounding him. What does it mean by giving him the right of way? Of course, it does not mean that every driver of an automobile in such a position must stop his car always, or remain at a standstill always. He has a right to proceed, and would be considered to be giving an approaching automobile the right of way if he, in the exercise of reasonable care, acting as a prudent man would act, gives the approaching automobile a reasonable opportunity to get by him, to go in front of him.

Perhaps it may be said that, if the person making the turn, or having the approaching automobile on his right, sees another automobile approaching at a considerable distance on the street, he is called upon to exercise the care of a reasonably prudent man either to stop short or to slow up, or do anything else that is necessary to give that approaching automobile the opportunity to go ahead of him, providing a reasonably prudent man would act in that way.

If the distance was so great that a reasonably prudent man would say that "the approaching automobile can not reach this intersecting point until I have passed it," then it is for the jury to decide whether that course was the conduct of a reasonably prudent man <sup>84</sup>

(2) Any person shall, at the intersection of public highways, keep to the right of the intersection of the centers of such highway when turning to the left <sup>85</sup>

#### Georgia

The court instructs the jury that there is a valid municipal ordinance of the city which requires that any person or persons operating or driving any vehicle upon the streets and lanes of this city, when turning into a street to the right, shall keep close to the right curb, and, when turning into the street to the left, shall swing wide of the left curb, passing beyond the center of the intersecting street. If he violates that ordinance, he would be guilty of negligence as a matter of law, and if by reason of such a violation of the ordinance and such negligence, a plaintiff or person is hurt or his property is injured, then there is a

<sup>84</sup> Neumann v Apter, 95 Conn 695, 112 A 350, 21 ALR 970

<sup>85</sup> Sparico v Munzenmaier, 134 Conn 194, 56 A2d 165

In this case, the trial court set

aside a verdict for defendant because of his own error in failing to give the foregoing instruction at the request of plaintiff

liability on the part of the person who did it, or whose employee did it <sup>86</sup>

#### Idaho

If you find from the evidence that at the time of the collision G H, the driver of plaintiff's car was driving in whole or in part upon the left of the highway, such act in itself would constitute negligence which would bar plaintiff's recovery; unless you further find that said G H, under the circumstances as they then appeared to him, believed as a reasonably prudent person, that if he continued upon the right side of the highway a collision with the defendant's car would ensue, and that to turn to the left was the most practicable way to avoid such collision, and further find that such belief was induced in the mind of G. H. by negligent operation by defendant of his car in some of the respects charged. If you so find that such belief existed in the mind of G H, and further find that he could have safely turned to the right and avoided the collision, and that to a reasonably prudent person, under the circumstances as they then appeared, it would have appeared equally safe to turn further to the right instead of upon the left half of the road, then it was the duty of G H to turn to the right instead of to the left, and his failure to do so would be negligence, barring any recovery here <sup>87</sup>

#### Indiana

(1) Gentlemen of the jury You are instructed that if you find from the evidence in this case that the plaintiff's wife had stopped her automobile at the intersection and was standing still at the time the plaintiff's machine was struck by the defendant and that the defendant had ample opportunity to avoid striking the plaintiff's automobile but neglected to do so, then you are instructed that the defendant would be liable. <sup>88</sup>

(2) By a "U" turn, forbidden by the ordinance in question mentioned in these instructions, is meant the operation of a vehicle in such a way that its course in general follows the outline of the printed capital letter "U" and by means of which the direction of such moving vehicle is reversed so as to leave it proceeding in the direction from which it had come immediately before so turning, all on the same street

You are further instructed that one need not have completed

<sup>86</sup> Collier v Schoenberg, 26 Ga App 496, 106 SE 581 See also Roberts v Phillips, 35 GaApp 743, 134 SE 837

<sup>87</sup> Hamilton v Carpenter, 49

Idaho 629, 290 P 724

<sup>88</sup> Layton v Lee, Municipal Court of Marion County, Indiana, No 7165, affd in 95 IndApp 663, 167 NE 540



a "U" turn on Broadway in violation of the ordinance herein-before mentioned to be guilty of negligence. Each and every part of the operation of the driver in so turning, as in these instructions defined, is negligence from the time such turn is begun until it shall have been completed, however a mere intention to make such a turn is not negligence. The vehicle in question would have to have actually been set in motion in the course of making the turn before the driver could be said to be negligent on account of provisions of said ordinance <sup>89</sup>

#### Iowa.

In this connection, you will consider the question as to whether the defendant, A C E, before he drove upon the pavement in question from his private driveway, saw the S. car coming from the east at an illegal and dangerous rate of speed, and saw that it was skidding upon the slippery pavement, as bearing upon the question whether, in the use of reasonable and ordinary care, said defendant should have waited until the S car had passed, before he entered upon said pavement <sup>90</sup>

#### Massachusetts

You are to take all the evidence, all the circumstances, and determine whether he was doing anything he ought not to have done under all the circumstances. He had the right to make that turn. He had a right to use any part of the street that he was coming into, subject only to the rights of other people who might be there. If two vehicles meet in a street, it is the duty of each one of them, as seasonably as they can, to get each on his own right-hand side of the traveled way of that street. But that law does not compel a man always to be on the right side. He can use any part of the street, so long as he is not interfering with the rights of other people, and the fact that this happened on the right-hand side of the street is only another piece of evidence to be considered by you. You are to consider whether P was endeavoring in making a turn, to get on the right-hand side near the hydrant, where, under certain circumstances, he properly belonged <sup>91</sup>

#### Michigan

He [a motorist] is bound to comply with all state laws applicable to the operation of motor vehicles. There is one law applicable especially to this case. The operator of any vehicle upon a highway in this state, before starting or stopping, or turning from a direct line, shall first see that such movement

<sup>89</sup> Setzer v Alger, Superior Court, NW 346  
Lake Countv, Indiana, No 1254

<sup>91</sup> Johnson v Shaw, 204 Mass  
165, 90 NE 518

<sup>90</sup> Stilson v Ells, 208 Ia 1157, 225

can be made in safety, and shall give a signal as required in this section. The signal herein required shall be given by means of hand and arm, or by mechanical or electrical signal or device—conveying by signal a warning to other drivers approaching from the rear—the important part being that the driver in this particular lane, the center lane, before stopping and before turning, should see that such movement can be made in safety. Now if R, the operator of this automobile, violated the statute, he is guilty of negligence. If R failed to make proper and suitable observation to determine whether he could turn to the left and cross the left two lanes in safety, he would be guilty of negligence.<sup>92</sup>

#### Minnesota

There are two different things. The statute provides that he should keep as near to the center of the street before making the turn and in making the turn, keep as near as practicable to the center of the intersection.

As far as keeping to the center of Lowry Avenue before making the turn, the jury will take into consideration the fact that the car had stopped over on the right-hand side and that it might not have been feasible for the car to get to the center of Lowry Avenue to comply with the first part of the statute before making the turn because he was already so near. But the jury will take the statute into consideration and also the facts as to where M was, how he did make the turn, and decide whether the statute was violated.

Then, as I said before, in construing that statute as to where he should drive, you should consider the situation he was in—he was parked there, and whether it was feasible for him to

<sup>92</sup> Seppala v Neal, 323 Mich 697, 36 NW2d 186

In the case cited, the court was speaking of the driver of defendant's car who, in attempting to turn left, collided with a car approaching from the *opposite* direction, in which plaintiff was riding. Judgment on verdict for plaintiff was affirmed.

Objection was made to that part of the instructions appearing here following words "made in safety" through "approaching from the rear" for the reason the statute contemplated a signal to be given for the benefit of drivers approach-

ing from the rear and not from the opposite direction. The court said the trial judge was obviously referring to the provisions of Comp Laws 1929, § 4711, Stat Ann, § G 1579 [CL (1948) § 256319] and that the provisions of the statute as to signal was for the benefit of drivers approaching from the rear, but that there was no prejudicial error, since the trial judge immediately corrected the error. Accordingly, in cases involving collisions between cars approaching from opposite directions, the above quoted language should be omitted.

get out to the center line of the street before he got to the intersection, that is a matter of common sense.<sup>93</sup>

Missouri.

(1) Your verdict should be for defendants, if you find from the evidence that plaintiff was contributorily negligent in failing to stop his car as near the right-hand side of the road as practicable, in failing to give defendant any warning of his intention to stop his car, or in failing to operate his car as close to the right-hand side of the highway as practicable

The court instructs the jury that if you find and believe from the evidence, that at the time and place mentioned in the evidence, plaintiff, while driving his car on the road mentioned in the evidence, stopped his said car so close to defendant's truck, that the driver of said truck, by the exercise of the highest degree of care on his part, could not avoid striking said automobile, then you will find the issues for the defendants<sup>94</sup>

(2) The court instructs the jury that if you find and believe from the evidence that the driver of the car in which plaintiff was riding brought his said automobile to a sudden and abrupt stop, and that the defendant, its agent and servant, thereafter, could not by the exercise of the highest degree of care have stopped his said truck, turned the same aside, and thus and thereby have avoided striking the automobile in which plaintiff was riding, then your verdict must be for the defendant, providing you further find that the defendant was not negligent in any way in the operation of his said motor-truck.<sup>95</sup>

(3) If you find and believe from the evidence that the plaintiff drove and operated his said automobile away from the east curb of Seventh Street at the place mentioned in the evidence, and was attempting to make a "U" turn south on said Seventh Street, and that plaintiff saw, or by the exercise of the highest degree of care could have seen, defendant's said bus then and there on said Seventh Street, moving in a northwardly direction, in time for plaintiff thereafter to have stopped his said automobile or swerved the same, and thus and thereby have avoided the collision as mentioned in the evidence, and that he failed so to do, and that he was negligent in failing so to do, and that this negligence directly contributed to cause what, if any, injury and damage plaintiff sustained, then your verdict must be for the defendant<sup>96</sup>

<sup>93</sup> Mahan v McCool, 185 Mmn 94, 239 NW 914

<sup>94</sup> Berthold v Danz (MoApp), 27 SW2d 448

<sup>95</sup> Geisendorf v Brashear Truck Co (MoApp), 54 SW2d 72.

<sup>96</sup> Szuch v Ni Sun Lines, Inc., 332 Mo 469, 58 SW2d 471

**New Jersey.**

The principle of law applicable to the making of a left turn is that if a person is making a left turn across a line of traffic, he must use great care and seek an opportune time <sup>97</sup>

**New York.**

It is negligence for one driving a motor vehicle on a street to turn, without looking, from his side of the street, abruptly across the line of travel passing in the opposite direction on the other side of the street. In so doing, he is not using reasonable care to avoid a collision, and is heedless of the consequences of his act to others <sup>98</sup>

**North Carolina**

With respect to that, gentlemen of the jury, if they approached the intersection, that is, M and R, R going north on Third Street, and M going south on Third Street, and turning to the left on Cowan Street, both automobiles approaching the intersection at approximately the same time, that is, if R was proceeding northwardly and M was proceeding easterly, turning to his left and going across the line of traffic, and you so find, then the court instructs you upon that finding that M owed the right of way to R, that is, that under those conditions, R had the right of way and the duty rested upon M to stop and permit him to pass

The judge further instructed the jury. On the other hand, if M had gotten into the intersection ahead of R, and they did not approach the intersection at approximately the same time, so as to endanger both to proceed, and M had already gotten into the intersection first, it was the duty of R to slow down and permit M to pass <sup>99</sup>

**Ohio**

There is another sort of negligence and that is negligence in the violation of a statute. If the statute is violated, that is negligence per se (that means in and of itself). The statute applicable in this case is R C § 4511.38, which provides "Before backing, operators of vehicles shall give ample warning, and while backing, they shall exercise vigilance not to injure persons or property on the street or highway." That means that they shall give such warning as a man of ordinary

<sup>97</sup> *Wadell v Public Service Co-ordinated Transport*, 3 NJ SuperCt 132, 65 A2d 766

The action in the case cited involved a collision between a truck

and a bus

<sup>98</sup> *Rounds v Fitzgerald*, 207 App Div 534, 202 NYS 595

<sup>99</sup> *Piner v Richter*, 202 NC 573, 163 SE 561

care and prudence would think necessary and use vigilance of the same sort.<sup>1</sup>

#### Oklahoma

You are instructed that if you believe from the evidence that the defendant, D A, at the time of the accident, suddenly turned the truck, which he was driving, sharply toward the left and drove the same immediately in front of the automobile in which plaintiff was riding, without any notice or warning of his intention so to do; and if you further believe that such action on the part of said defendant D A was a failure to exercise ordinary care on his part under the circumstances then existing, then such failure, if any failure there was, would be negligence.<sup>2</sup>

#### Oregon.

(1) It is the law of this state [Rev Stat, § 483 316], that all vehicles approaching an intersection of a state road or highway with the intention of turning thereat shall, in turning to the left, run to and beyond the center of the intersection before so doing.<sup>3</sup>

(2) If you shall find from the evidence in this case that the defendant in turning north from Sandy Road into East Thirty-Seventh Street did not go to and beyond the center of the intersection of said street, then such act on his part would be a violation of the laws of this state, and if by reason of so failing to do, he struck and injured plaintiff, he would be guilty of negligence. If you shall find from the evidence that at the time of the collision between plaintiff and defendant's car the defendant was operating his car on the left or west side of East Thirty-Seventh Street, then I instruct you that such act was a violation of the laws of this state, and the defendant would be guilty of negligence, and if by so doing he injured the plaintiff, he is guilty of negligence.<sup>4</sup>

(3) I instruct you that if you find the defendant had a reasonable ground to believe that plaintiff had stopped her car on the westerly half of the pavement, and that there was clearly room to pass in front of plaintiff's car, the defendant would have a right to pass in front of her, even to the extent of going to the left side of the highway, and if the plaintiff then suddenly started her car and attempted to pass in front of defendant,

<sup>1</sup> Buckeye Stages, Inc v Bowers, 129 OhSt 412, 2 OhOp 401, 195 NE 859

<sup>2</sup> Gibson Oil Co v Westbrooke, 160 Okl 26, 16 P2d 127.

<sup>3</sup> Kitchel v. Gallagher, 126 Or 373, 270 P 488

<sup>4</sup> Ordeman v Watkins, 114 Or 581, 236 P 483

and a collision was certain if both continued in the direction in which they were then going, it would be the duty of the defendant to use his best judgment as to his course of action to try to avoid a collision, and if you find he did use every precaution he reasonably could use under the circumstances, then he would not be guilty of negligence <sup>5</sup>

(4) Whether in turning to his right, if he did so, defendant was negligent is a question for you to determine under the rule that if an ordinarily prudent man in defendant's circumstances at the time would have done as defendant did, then it was not negligence on defendant's part to make such turn <sup>6</sup>

#### Tennessee

(1) The said M L had the right to drive his car on and along the Jackson Highway. He had the right to stop at said filling station to procure refreshments or for other purposes; however, as before stated, it was his duty, in turning from the filling station onto the highway to resume his drive, to exercise ordinary care and prudence for the safety of his guest, Miss F. <sup>7</sup>

(2) If the defendant L. suddenly drove his car upon the highway immediately in front of C's car, while he, C., was driving along the highway exercising ordinary care and prudence, so as to create a sudden emergency, then it was C's duty to exercise ordinary care under the circumstances to avoid a collision and injury and if he did so upon that occasion, then he would not be liable though it may appear now that a different course on his part would have been a better and safer course. But of course this principle of law would have no application if the sudden emergency was brought about by the negligence of the said C., and if it was so brought about you would determine the issues in the case under the law as explained in the other parts of this charge <sup>8</sup>

#### Washington.

(1) You are instructed that where a road starts from or leaves a state highway or arterial main traveled highway, travelers on such highway have the right of way over those seeking to turn to their left and enter upon the road <sup>9</sup>

(2) While the paramount duty of the driver of a motor vehicle is to keep a lookout ahead, and, while he may assume that drivers of vehicles following from the rear will observe the

<sup>5</sup> McCartney v Westbrook, 132 App 355, 77 SW2d 817  
Or 488, 286 P 525

<sup>6</sup> Williams v Bryson, 149 Or 413, 355, 77 SW2d 817  
40 P2d 61

<sup>7</sup> Caldwell v Hodges, 18 Tenn 14 P2d 697

<sup>8</sup> Caldwell v Hodges, 18 TennApp

355, 77 SW2d 817

<sup>9</sup> Strong v Ernst, 169 Wash 617,

laws of the road, he cannot entirely ignore such vehicles.<sup>10</sup>

(3) When two automobiles are approaching each other on a highway, the one may not lawfully turn directly into the path of the other, even though the place of turning be an intersecting highway which the turning automobile reached first. Before this right may be lawfully exercised, the other automobile must be sufficiently far away to enable the turning automobile to pass in the clear, or it must be made after a visible signal is given of the intention to so turn in time to enable the other automobile, in the exercise of reasonable care, to avoid a collision.<sup>11</sup>

(4) Even though you find from the evidence in this case that the school district or its driver was negligent in one or more of the particulars charged in the complaint, yet if you further find from the evidence that after the plaintiffs saw the school bus in the act of making the turn, plaintiffs, in the exercise of ordinary care and diligence on their part, could have stopped, slowed down or turned their car in time to have avoided the accident and failed to do so, then under such circumstances the plaintiffs cannot recover and your verdict must be for the defendant.<sup>12</sup>

Wisconsin.

(1) If W knew or had good reason to believe that someone might get back of that truck after he took his last observation and before starting up, or if under all the circumstances he should have known or did know that someone might get back there, then it was his duty to keep a close lookout, even to the point of its being necessary for him to get out of his truck, walk to the rear and find out.<sup>13</sup>

(2) The backing of any vehicle entails more or less limitation of the view of the driver of the area to be traversed, and thus requires a vigilant lookout on the driver's part to avoid causing injury to persons who are known to be or likely to be in the vicinity of the car that is being backed up.

Now the defendant, L. S., was chargeable with knowledge of the traits of a child of B. J. H's age, which would require increased vigilance as to lookout on her part if she knew, or, in the exercise of ordinary care ought to have known, that B. J. H either was or was likely to be to the rear of the car.<sup>14</sup>

<sup>10</sup> Curtis v Perly, 171 Wash 542, 18 P2d 840

<sup>11</sup> Webber v Park Auto Transp Co, 138 Wash 325, 244 P 718, 47 ALR 590.

<sup>12</sup> Farmer v. School Dist No 214,

171 Wash 278, 17 P2d 899

<sup>13</sup> Patterson v Edgerton Sand & Gravel Co, 227 Wis 11, 277 NW 636

<sup>14</sup> Hartzheim v Smith, 238 Wis 55, 298 NW 196

(3) You are instructed that the duty rested on the defendant, L C, in crossing over the left side of the highway to enter a private driveway to find an opportunity sufficiently clear so that in the exercise of ordinary care, he could cross said left side of the highway without creating a condition dangerous to others, as well as to himself, and likely to result in injury.<sup>15</sup>

(4) If he was meeting the plaintiff, it was his duty to drive in such a manner as not to turn his car suddenly in front of him without warning, and at such a time when the plaintiff was about to drive in a position where the turning by the defendant O would probably cause a collision. Where was the Z car at the time? Was it so far south, or was he so far south of the intersection, and apparently coming at such a speed, that O, in the exercise of common, ordinary care, had a right to believe that he had plenty of time to pass in safety, or was the Z car in the intersection, or about to enter the intersection, and did O carelessly, or negligently, drive in front of it and attempt to go through there on Vine Street before the Z. car had an opportunity of passing? A great deal depends in answering that question on the positions of the two cars, their relative positions, the speed at which they were driving, and conditions that existed at the time.

Now what I said about excessive speed before, also applies to excessive speed under this question. The circumstances as to each driver were somewhat different. One was traveling on highway 53, intending to travel straight on that highway, without making a turn. The other was intending to make a left-hand turn. That makes a somewhat different condition. It is a circumstance. Then you will consider what position the cars were in at the time that O first indicated an intention to make a left-hand turn. Even if Mr Z had the right of way, even if he was first in the intersection, and even if O was negligent in driving in front of him, it was still the duty of Z to exercise reasonable care to avoid a collision. Because one driver is careless, or violates the law, does not justify another driver in being careless, or in permitting a collision, if, by the exercise of ordinary care, he can prevent it. So you will consider the circumstances, and the opportunity, if any, which Mr Z had to stop his car, or slacken his speed so as to prevent a collision, if he had any such opportunity. Possession of the right of way does not justify the possessor in plunging ahead, careless of consequences, nor of failure to exercise ordinary care to avoid injury to others or to himself. If a driver of a

<sup>15</sup> Gauthier v Carbonneau, 226 Wis 527, 277 NW 135



car, by the exercise of an ordinary degree of care, should have discovered that there was danger of a collision at a time when he could stop his car and avoid it, that was his duty, although he had the right of way <sup>16</sup>

### § 465. — Speed.

#### Alabama

The court charges the jury that if they believe from the evidence that the driver of the automobile was running at a reasonably prudent rate of speed and attempted to turn into Avenue E in a reasonably prudent manner on the occasion complained of, you should return a verdict for defendant. <sup>17</sup>

#### Iowa

If E O., as he approached the intersection of the east approach of public highway No. 149 with highway No. 6 at the time of the collision in this case, saw the vehicle operated by defendant, C O B, approaching at such a distance from said east approach of said intersection that, acting as a reasonably cautious and prudent person would act, he believed and had a right to believe, that he could make the turn into highway No. 149, and clear the intersection in safety ahead of the approaching vehicle, he could not be guilty of negligence in undertaking to do so. <sup>18</sup>

#### Tennessee.

Now, her theory is that this was, I believe she said, a block away coming towards her when she looked at it, and that she didn't know the rate of speed it was traveling; that she didn't look any more until she was struck. Gentlemen of the jury, she had a legal right to assume that this northbound car of the defendant would obey the law and she did not have to assume that this car was being driven in excess of 25 miles an hour, unless her view of it was such as would indicate to her that it was going at such rate of speed that he could not yield the crossing, in which event she was guilty of negligence if she undertook to go in front of him. If, however, the car was such a distance away that she did not know its rate of speed, she had the right to assume that it was traveling at a lawful rate of speed, and she would not be guilty of contributory negligence.

If this northbound car was traveling at a lawful rate of

<sup>16</sup> Zutter v O'Connell, 200 Wis 601, 229 NW 74

<sup>17</sup> Karpeles v City Ice Delivery Co., 198 Ala 449, 73 S 642

<sup>18</sup> Enfield v Butler, 221 Ia 615, 264 NW 546 See also Baker v Zimmerman, 179 Ia 272, 161 NW 479

speed and she had driven in front of it, even though she had reached the intersection first, and knew she would collide with it if she undertook to cross in front of it, she would be guilty of contributory negligence under the law. But if when she undertook to cross, the northbound car was such a distance away that had the defendant obeyed the law, she could have crossed in safety, then she had a right to undertake to cross in front of it, unless she knew or should have known that it was exceeding the speed limit and that he could not stop, in which event she would be guilty of contributory negligence <sup>19</sup>

#### § 466. — Lookout.

When one is required to look for approaching cars upon a highway, he is required to perform that duty attentively. In other words, the duty is not performed by merely glancing in an absent-minded or careless manner. One must see what is before his eyes to be seen. If, therefore, plaintiff looked and did not see defendant's car when it was right before his eyes to be seen, then he was negligent. If, however, the car was so far away that persons of ordinary prudence would not have taken note of it, then, of course, he was not negligent. The test in all cases is what persons of ordinary prudence usually do under the same or similar circumstances. Now, if the plaintiff was negligent in failing to see defendant's car and that negligence contributed to the happening of the accident, there can be no recovery in either action. <sup>19a</sup>

#### § 467. — Signals of operator.

##### Alabama

The court charges the jury that, if you believe from the evidence that the place where the collision occurred was not frequently traveled by automobiles or other vehicles, and that the driver of defendant's automobile had no reason to believe that an automobile was approaching him from the rear, and did not know that plaintiff's automobile was approaching him from the rear, then the driver of defendant's automobile was under no duty to hold out his hand or give other signal of his intention to turn across or out of the road into a private driveway or street. <sup>20</sup>

##### Arkansas

I instruct you, gentlemen, that the driver of any vehicle

<sup>19</sup> Sundock v Pittman, 165 Tenn 263 NW 624  
17, 52 SW2d 155

<sup>20</sup> Government Street Lbr Co v Ollinger, 18 AlaApp 518, 94 S 177

<sup>19a</sup> Jensen v Glemaker (Minn),

upon a highway, before starting, stopping, or turning from a direct line, shall first see that such movement can be made in safety, and, whenever the operation of another vehicle may be affected by such movement, shall give a signal, plainly visible to the driver of such other vehicle, of the intention to make such movement.<sup>21</sup>

#### California

(1) Plaintiff A. W. had a right to assume that defendant N. H. would drive her automobile in a careful, prudent and lawful manner and that if she intended to make a left turn upon the highway, that before turning, she would see that the turn could be made in safety and would give a signal plainly visible of her intention to make such turn.<sup>22</sup>

(2) You are instructed that when the driver of an automobile upon a public highway has given a signal indicating that he intends to turn in a given direction, other operators of vehicles upon the highway have a right to assume that such driver so giving such signal will turn in the direction indicated by such signal, and it is negligence for the driver of a vehicle so giving such signal to turn or travel in any other direction than that indicated by the signal, without first indicating or signaling such intended change of direction.<sup>23</sup>

(3) I instruct you that it was the duty of the defendant to see if there was any car back of him that might be affected by his turn, and if there was, to make a signal plainly visible to such car in the manner provided by the state Vehicle Code, and the failure so to warn such car would constitute negligence on the part of the defendant. I further instruct you that if you believe that the defendant, L., complied with the above rule of law and used such care as an ordinarily prudent person would have used under ordinary or similar circumstances, then I instruct you that the defendant L. was not negligent and your verdict must be in favor of the said defendant, L.<sup>24</sup>

#### Indiana

Gentlemen, I instruct you that it is provided by statute in the state of Indiana that it is unlawful for any person who is operating a motor vehicle on a public highway of the state to turn such motor vehicle to the left on said public highway without first signaling his intention to any person or persons

<sup>21</sup> Southwestern Bell Tel Co v Balesh, 189 Ark 1085, 76 SW2d 291

<sup>22</sup> Webster v Harris, 119 CalApp 46, 6 P2d 88

<sup>23</sup> Mogle v Hunt, 110 CalApp 177, 293 P 844

<sup>24</sup> Ackles v Lane, 140 CalApp 188, 35 P2d 200

who may be following closely in the rear, by extending the left arm in a horizontal position, or by the use of a mechanical device so designed and adjusted as to indicate plainly by light, word, arrow or other character or characters the intention of the operator.

I further instruct you that the operation of a motor vehicle on a public highway of the state in violation of such provision is *prima facie* negligence on the part of such operator, subject, however, to be rebutted by evidence to the contrary. But it is for you to determine from all the evidence in the case whether the driver of defendant's truck did turn to the left, as alleged in the complaint and whether he did signal his intention of turning his truck to the left <sup>25</sup>

#### Iowa

You are instructed that it is the law of this state, and was the law at the time of the collision between the car owned by the plaintiff and truck owned by the defendant, that the operator of a motor vehicle shall, before turning or changing the course of his vehicle, first see that there is sufficient space to make such movement in safety, and shall give a visible or audible signal to the drivers of vehicles following, of his intention to make such a movement, by raising and extending the hand or by a proper signal or device indicating with it the direction in which he wishes to turn.

And you are further instructed that if you find by a preponderance of the evidence in this case, that the plaintiff, before moving his automobile from the place where it was in a stationary position and turning it across the highway and proceeding toward the driveway on the south side thereof, did not first see that there was sufficient space to make such movement in safety, or did not give a visible or audible signal to the drivers of vehicles following, of his intention to make such a movement, then he was guilty of negligence and cannot recover on his claim against the defendant in this action, and on that branch of this case, your verdict should be for the defendant. <sup>26</sup>

#### Kentucky.

(1) It was the duty of plaintiff on the occasion complained of, if she knew or by the exercise of ordinary care could have known that defendant's car was close behind her car, to warn defendant by some appropriate signal or gesture that she intended to stop her car, and if the jury believe

<sup>25</sup> Cavanaugh v Polk Sanitary Milk Co., Circuit Court, Marion County, Indiana, No 44487, In-

structions, 1930-32, p 13

<sup>26</sup> Dillon v Diamond Products Co., 215 Ia 440, 245 NW 725

from the evidence that on the occasion complained of plaintiff knew, or by the exercise of ordinary care could have known, that defendant's car was traveling close behind her own car, and stopped said car without sign or signal, and defendant's car ran into plaintiff's car by reason thereof, then they will find for the defendant. However, if the jury believe from the evidence that defendant's driver saw, or by the exercise of ordinary care could have seen, that plaintiff's car had been stopped, or was about to be stopped, and failed to use ordinary care to stop his car and avoid a collision, and negligently ran into the rear of said car, and caused the injuries set forth in the first instruction, they will find for plaintiff.<sup>27</sup>

(2) If N. reached the intersection first and signaled his intention to make the turn, he had the right of way, unless C entered the intersection before he had completed the turn.<sup>28</sup>

#### Maryland

The court instructs the jury, if they find from the evidence that the defendant, on the occasion of the accident mentioned in the evidence, and upon discovering that the plaintiff was following her automobile, extended her hand out on the left side of her car in such manner that the plaintiff by the exercise of reasonable diligence might have seen it, and held it there until she reached the drain mentioned in the evidence or thereabout, that upon reaching the road leading to the W. home, she crossed over, and entered said road, and that she exercised such ordinary care, prudence, and caution as the ordinarily prudent person would have used under the circumstances, then their verdict must be for the defendant.<sup>29</sup>

#### Michigan

The vital or crucial negligence, if any, involved in this case, relates, not so much to the rate of speed at which the cars of the defendants were driven at the time of the accident, although the rate of speed may be incidentally involved, but rather to whether signals were given by defendant Y as to his desire to pass the car driven by defendant F, and whether defendant F. heard them or not, and whether he should or would have heard them if he had been exercising his faculties as an ordinarily careful, prudent, and vigilant person would have done under like circumstances, also whether defendant F gave the signals that he claims to have given of his intention to turn to the

<sup>27</sup> *Slate v Witt*, 188 Ky 133, 221 SW 217

<sup>28</sup> *Coleman v Nelson*, 224 Ky 460, 6 SW2d 454. See also *Slate v Witt*, 188 Ky 133, 221 SW 217;

*Marsee v Bates*, 235 Ky 60, 29 SW2d 632

<sup>29</sup> *Wingert v Cohill*, 136 Md 399, 110 A 857

left at the intersection of Seneca Street and Godfrey Avenue, and whether those signals were timely and given substantially, as the law requires.<sup>30</sup>

Missouri.

(1) The driver of a forward car, in making a sudden stop, must give a warning to a car closely following.<sup>31</sup>

(2) It is the duty of the driver of a motor vehicle to give a signal or warning of his intention to turn his motor vehicle to the right or left at intersecting streets or highways, where the circumstances and conditions are such that care and prudence would dictate that such signal or warning be given in order to protect the lives and property of other persons, then on or using such highways.<sup>32</sup>

(3) The court instructs the jury if you find and believe from the evidence that the driver of the automobile in which plaintiff was riding did not give a warning of his intention to stop said coupe, that he was negligent in failing to give said warning, if you so find, and that this negligence was the direct and sole cause of the collision mentioned in the evidence, then your verdict must be for the defendant, providing you further find that the defendant was not negligent in any manner in the operation of its truck.<sup>33</sup>

(4) The court instructs the jury that under the law, it is the duty of every person operating a motor vehicle on the highways of this state to drive the same in a careful and prudent manner, and to exercise the highest degree of care and to drive at a rate of speed so as not to endanger the property, life or limb of any person. Therefore, you are instructed that if you find and believe from the evidence in this case that on or about July —, 19—, the plaintiff was riding in an automobile, driven by his brother, J. W. S., on United States Highway No. 61, near Mehlville, in the county of St. Louis, and driving toward said city, and at the time exercising the highest degree of care for his own safety, and if you further find and believe from the evidence that at said time and place the defendant's agents, servants and employees were operating over and on said highway, one of defendant's passenger buses, traveling in the same direction of plaintiff's car, and immediately following the same, and if you further find and believe from the evidence that at said time and place plaintiff, or other occupants of the car in

<sup>30</sup> *Greenwold v. Faber*, 234 Mich 217, 207 NW 911

<sup>31</sup> *Ritz v. Cousins Lbr. Co.*, 227 MoApp 1167, 59 SW2d 1072

<sup>32</sup> *Phillips v. Henson*, 326 Mo 282, 30 SW2d 1065

<sup>33</sup> *Geisendorf v. Brashear Truck Co.* (MoApp), 54 SW2d 72

which plaintiff was at the time riding, signaled that the car in which plaintiff was riding was going to slow down or stop, and if you further find and believe from the evidence that at said time and place defendant's agents and servants in charge of said bus failed to exercise the highest degree of care by driving the same at a high and dangerous rate of speed so as to endanger the life and limb of persons traveling on said highway, including this plaintiff, or if you find and believe from the evidence that the defendant's agents and servants in charge of said bus negligently failed to observe or heed the signal given by the driver of the car in which this plaintiff was at the time riding, if you find any signals were so given, and also failed to stop said bus so as to avoid hitting plaintiff's car, and if you further find and believe from the evidence that by reason of the failure to exercise the highest degree of care as above set out, and as a direct result thereof, the defendant's bus ran into the car in which plaintiff was at the time riding, and that the plaintiff was injured thereby, your verdict will be for the plaintiff and against the defendant.<sup>34</sup>

#### Oregon

(1) It is the statutory law of this state that the driver of any vehicle upon a highway, before starting, stopping or turning from a direct line, shall first see that such movement can be made in safety. Whenever the operation of any other vehicle may be affected by such movement, he shall give a proper signal which is plainly visible to the drivers of any such vehicles of the intention to make any such movement. It makes no difference which end of the vehicle is going first, that is, whether the driver is going ahead or is backing up when he is making such movement.

I instruct you that it is the duty of the driver of a vehicle to maintain a reasonable lookout to ascertain whether or not such movement can be made in safety to yield the right of way to oncoming traffic if such cannot be made safely.<sup>35</sup>

(2) If you find from the evidence that the defendant J. was backing his truck toward the north on Commercial Street with the intention of turning to the west, and at that time, the defendant E. was driving his truck to the east on the same street with the intention of passing J.'s truck, but, as E. approached J., J. ran his truck in front of E.'s truck without signaling his intentions, E. would not have a right to run deliberately and ruthlessly into J.'s truck, but it would be his duty to use

<sup>34</sup> Schlue v Missouri Pacific Transp Co (MoApp), 62 SW2d 934  
<sup>35</sup> Carter v Lester, 210 Or 209, 309 P2d 1001.

every reasonable means and care to avoid the collision, and, if necessary and possible, to stop his car before colliding

You are instructed that one using the highways is entitled to assume that other persons using such highways will obey the laws of the state and act with reasonable diligence and prudence, so defendant E had a right to assume that other persons using Commercial Street at and just prior to the time of the accident would conduct themselves with reasonable prudence and diligence, and not cause an automobile to be backed or turned across the street into the automobile which E was driving without giving any warning. The same would also be true with reference to J in driving his truck, and he would have a right to assume that any other person traveling the street at that time would also observe the law, and conduct himself in a prudent and careful manner.<sup>36</sup>

#### Washington

When a hand and arm signal is timely given by a driver of a vehicle of his intention to turn at a street intersection, and it is plainly visible to a driver approaching from his rear on his left, then it is immaterial whether or not his vehicle is one required to be equipped with a mechanical signaling device.

Even though you find from the evidence in this case that the school district was negligent in failing to equip the school bus with a mechanical or electrical device capable of displaying signals to the rear of the bus as to the intention of the driver to turn, still if you further find from the evidence that the driver of the school bus gave a timely arm signal of his intention to turn prior to the time he turned to the left, and that the plaintiff's automobile was operated to the left of the bus and from his position on the street he saw, or in the exercise of ordinary care ought to have seen, such arm signal, then under such circumstances, members of the jury, the failure of the school district to provide such mechanical device is immaterial to a determination of this case and should be disregarded by you, because, under such circumstances, the failure to provide such device would not be the proximate cause of the accident.<sup>37</sup>

#### Wisconsin.

(1) An operator of an automobile, proceeding ahead of another automobile going in the same direction, owes the duty to

<sup>36</sup> Peters v Johnson, 124 O. 237, 171 Wash 278, 17 P2d 899. See also 264 P 459. Jacklin v North Coast Transp Co,

<sup>37</sup> Farmer v School Dist. No 214, 165 Wash 236, 5 P2d 325



any operator known to be close behind, to give warning of any intention to stop while still in the same line of travel <sup>38</sup>

(2) It is the duty of every operator of an automobile, when intending to turn to the left at an intersection, to give some visible sign or signal as by holding out the hand or some equivalent signal, of intention to turn, so as to give reasonable warning to the operator of any other vehicle approaching, of the intention to turn to the left. It is also the duty of every automobile operator to keep a careful lookout so as to see and to take proper precaution to avoid collision with any other vehicle approaching the intersection at the same time.

These inquiries concerning A. L.'s conduct require you to decide from the evidence whether he attempted and began to turn to the left to go on to the side road before the collision occurred, so as to drive his car into the line of travel of the defendant's car. Did he turn his car so as to bring the car, or any part of it, to the east side of the middle of the highway just before the collision? A. L. admits that he gave no signal of his intention to turn to the left and admits that he knew that a car was approaching rapidly from the rear. If he, under such circumstances, turned his car to the left so as to bring it or any part of it, to the east of the middle of the traveled roadway, then he was negligent.

It is admitted that no horn or other signal was sounded by the defendant S., but it is also admitted that A. L. knew that defendant's car was coming up from the rear, so the sounding of the horn would not have given A. L. any more information of the coming of the defendant's car.

Using these facts and principles, you are to decide from the evidence whether A. L. was negligent in either of the particulars mentioned in the question. <sup>39</sup>

#### § 468. — Stop lights on rear of automobile.

You are instructed that no person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal, by extending the hand down, to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

You are instructed that the law does not recognize as a stop

<sup>38</sup> Stock instruction of Circuit Judge A. H. Reid, Wausau, Wisconsin. See also *Stewart v. Olson*, 188 Wis. 487, 206 NW 909, 44 ALR 1292, *Zutter v. O'Connell*, 200 Wis.

601, 229 NW 74.

<sup>39</sup> *Lapsenberg v. Snapp*, Circuit Court, Lincoln County, Wisconsin, see 205 Wis. 681, 238 NW 289.

signal the electrical intensification of the red lights on the back end of the automobile where there is no lettering thereon with the designation "stop."<sup>40</sup>

**§ 469. Automobiles standing, parked, or unattended.**

**California**

You are further instructed that the failure to use reasonable care to comply with said provision of law would be in itself negligence as a matter of law, and, therefore, if you find from a preponderance of all of the evidence that the defendant, L. K. B., failed to use reasonable care to have said vehicle stand on American Avenue in such a way as not to obstruct the free use thereof, and that such failure was proximate cause of the accident in question, then your verdict must be in favor of the plaintiffs, unless you should further find from a preponderance of all of the evidence, and under the instructions of the court, that the plaintiffs were also guilty of negligence, which was a proximate cause of the accident in question.<sup>41</sup>

**Delaware.**

The plaintiffs contend that the defendant at the time of the accident had stopped its motor vehicle on the paved portion of the public highway known as the duPont Boulevard, in violation of the statutes of this state. If it had, then we say to you that such violation would constitute negligence on the part of the defendant, and it would be liable in this action, if such negligence was the cause of an accident and the plaintiffs' own negligence did not contribute thereto. The defendant contends that it violated no statute, but that if there was a violation of the statute, whether, as alleged by the plaintiffs, because no red light projected from the rear of the truck, or because a lookout was not maintained, nevertheless such violation did not cause the accident because there was sufficient daylight to enable the plaintiffs to see the truck standing in the road. It is for you to say whether there has been a violation of any statute, and if so, whether such violation did cause the accident.

But, if G. P. F., by the exercise of due care and caution on his part, could have avoided the accident, it was his duty to do so, and his failure so to do would prevent both him and his wife, E. R. F., from recovering in these actions no matter if the truck of the defendant company had been left on the paved portion of the highway aforesaid, in violation of

<sup>40</sup> *Harrington v Fortman*, 233 Ia 92, 8 NW2d 713, reversing judgment for failure to give the foregoing requests to charge

<sup>41</sup> *Miner v Dabney-Johnson Oil Corp* (CalApp), 22 P2d 265, *affd* in 219 Cal 580, 28 P2d 23

the statutes, and no lookout was kept or maintained by the defendant. The law does not permit anyone to recover damages from another for injury, if his own negligence has contributed thereto, or where, by the exercise of reasonable care, he could have avoided it, no matter how great the negligence of such other person may have been. This is what is generally known as the "last clear chance rule," and if the jury believe that the plaintiff, G. P. F., had a clear chance, by the exercise of reasonable care, to avoid the accident, and failed to make use of this chance, then such neglect on his part would constitute the proximate cause of the accident and the defendant company would be free from liability in both cases and there could be no recovery in either of these suits.<sup>42</sup>

#### Indiana

Before there can be a recovery in this case, it must be shown that the driver of the car in which plaintiff was riding could not see the defendant's truck in time to have avoided the collision and further, that the driver's failure to so see the truck was the fault of the defendant as charged in the complaint or one paragraph thereof.

The court instructs you that it is not unlawful in the state of Indiana to park a motor vehicle or leave it standing without an attendant on the traveled portion of a highway outside the corporate limits of a city in case of emergency. But it is for you to determine from all the evidence in the case whether the truck in question was left without an attendant and if so, whether an emergency existed in this case.

Before there can be a recovery in this case against the defendant, it must be shown that this defendant was careless or negligent in the manner charged in the complaint or one paragraph thereof and that such carelessness or negligence was the proximate cause of the injuries complained of by the plaintiff and if you find that the driver of the car in which plaintiff was riding did see or could have seen the defendant's truck by the exercise of ordinary care in ample time to have stopped said car or passed to the left of it and avoided the collision which caused the injury to plaintiff, and negligently and carelessly failed to do so, then the defendant's carelessness or negligence, if any, would not be the proximate cause of the injuries to the plaintiff and the plaintiff could not recover from this defendant, and in that event, your verdict should be for the defendant.<sup>43</sup>

<sup>42</sup> *Island Exp., Inc. v. Frederick*,  
5 W. W. Harr (35 Del) 569, 171  
A 181

<sup>43</sup> *Fenton v. Indianapolis Glove*

*Co.*, Super Court, Marion County,  
Indiana, No. 39625, see 89 IndApp  
173, 166 NE 12

**Iowa.**

If the plaintiff halted his car at the extreme right side of the roadway, with the intention of then and there making a temporary stop to remove ice from his windshield, then such temporary stopping would not constitute negligence as a matter of law. <sup>44</sup>

**Maryland**

If you believe from the evidence that the defendant's servant, in charge of defendant's truck, drove said truck to a point on the north side of Franklin Street, opposite the house known as number 114 West Franklin Street; that said servant brought said truck to a stop at the point aforesaid, near the curb; that said servant turned off the ignition and set the brakes of said truck as careful and prudent persons usually do; that said servant in pursuance of his duty left said truck and entered the house aforesaid to deliver a package; that in his absence, said truck, without the fault of defendant or defendant's servant, began to move west down Franklin Street toward Park Avenue, then there is no evidence of negligence on the part of the defendant or the defendant's servant, and the verdict of the jury must be for the defendant.

If the jury find from the evidence that the defendant corporation negligently permitted its motor delivery truck to drive itself at a great rate of speed, with no one in charge of the engine or steering apparatus thereof, through the street in the city of Baltimore, in such manner as to endanger the lives and property of persons on the street, and if because of such conduct on the part of the defendant corporation, the plaintiff, while acting in a reasonably prudent and careful manner, sustained injuries, the verdict must be for the plaintiff <sup>45</sup>

**Michigan**

(1) In this case, if you find from the evidence that, because the D. truck had stopped on the south side or to the left of the center of the highway, and was headed west with its headlights showing, the deceased, A. B., was suddenly confronted with this situation and if the ordinarily careful and prudent man would under like circumstances, have stopped, made an investigation as to whether it was safe for him to proceed, or as to how he should pass, then he was not guilty of negligence in so stopping, and his right to recover could not be defeated or lost on the ground that he was guilty of negligence, which contributed to the injury.

<sup>44</sup> Winter v Davis, 217 Ia 424, 126 Md 254, 94 A 1026, Ann Cas 251 NW 770

<sup>45</sup> American Exp Co v Terry,

1917C, 650

I further instruct you that, under the circumstances of this case, the truck of the deceased, A. B., was not parked at the time he received his injury and that he was not guilty as a matter of law, of negligence in stopping his car to ascertain whether he could safely proceed

On this occasion in question, the deceased, A. B., if he saw the headlights of the D truck to the left of the center of the pavement, had a right, and it was his duty, before proceeding, to make such investigation as was necessary, to ascertain whether or not that truck was standing or whether it was coming toward him, and, if he could not safely determine whether he could pass to the right or to the left of it until he was within 25 or 30 feet of it, then he had a right, and it was his duty, to stop his car until he had learned how he could safely pass.<sup>46</sup>

(2) An automobile does not cease to be operated when temporarily stopped or left standing on the traveled portion of a public highway. The word operated is not limited to a state of motion produced by the mechanism of the car, but includes at least ordinary stops upon the highway, and such stops as are to be regarded as fairly incidental to its operation.<sup>47</sup>

#### Missouri

(1) The court instructs the jury that if you find and believe from the evidence that the plaintiff saw, or by the exercise of the highest degree of care could have seen, that the automobile truck of the defendant was stationary upon the highway, in time to have stopped, swerved or turned aside, and thereby avoided the collision with defendants' truck, but that the plaintiff carelessly and negligently failed so to do and that as a direct result thereof, he ran into and against the truck of the defendants, thereby injuring himself, then you are instructed that your verdict shall be for the defendants<sup>48</sup>

(2) The court instructs the jury that it is the duty of the operator of every motor vehicle on the public streets and highways in the state of Missouri to exercise ordinary care in parking their motor vehicle so as not to endanger persons lawfully using such streets and highways.

The court therefore instructs the jury that if you find and believe from the evidence that at the time and place mentioned in evidence, Heege Road and Genesta Ave. were open, public streets in St. Louis County, Missouri, and that Genesta Ave.

<sup>46</sup> Bowmaster v William H De Pree Co., 252 Mich 505, 233 NW 395

<sup>47</sup> Hanser v Youngs, 212 Mich

508, 180 NW 409

<sup>48</sup> Jones v Missouri Freight Transit Corp., 225 MoApp 1076, 40 SW2d 465

intersected Heege Road on the north, and that pedestrians and particularly children customarily crossed Heege Road at the west side of Genesta Ave., and that defendant company, through its employee knew or, by the exercise of ordinary care, would have known that pedestrians and particularly children customarily crossed Heege Road at the west side of Genesta Ave., if you find they did so, and that defendant company, acting through its employee, parked its motor truck on the south side of Heege Road across the place where pedestrians customarily cross Heege Road at the west side of Genesta Ave., if you so find, and with said motor truck extending into said intersection, if you so find, and that at the time in question plaintiff was in the act of crossing Heege Road from the south to the north side thereof at the west side of Genesta Ave., and that he passed to the rear (west) of said truck and that plaintiff's view of westbound automobiles on Heege Road approaching the place where he was crossing was obstructed by said truck, and that at said time and place defendant L. was driving an automobile west on Heege Road approaching and at the place where plaintiff was crossing, and that defendant L's view of plaintiff crossing Heege Road was obstructed by said truck after plaintiff started northwardly to cross said street until plaintiff reached a place one to three feet on the black top portion of Heege Road, and that said truck thereby endangered the safety of plaintiff while crossing Heege Road, if you so find, and that defendant company, at the time it parked said truck, knew or by the exercise of ordinary care would have known that said truck was likely to endanger the safety of plaintiff while crossing from the south to the north side of Heege Road, if you so find, and that defendant company, by the exercise of ordinary care could have parked said truck at a place reasonably convenient for making deliveries to the Heege Market, and so as not to endanger the safety of plaintiff in crossing Heege Road at the place in question, if you so find, and that the automobile driven by defendant L. collided with plaintiff and that plaintiff was thereby injured, and that in so parking said truck under the aforesaid conditions defendant company failed to exercise ordinary care to park said truck so as not to endanger plaintiff while crossing Heege Road and was thereby negligent, if you so find, and that such negligence, if any, thereby directly caused, or directly contributed to cause plaintiff to be injured, if you so find, then your verdict should be in favor of plaintiff and against defendant company. <sup>49</sup>

<sup>49</sup> Boese v Love (MoSupCt), 300 SW2d 453

(3) The court instructs the jury that if you find and believe from the evidence in this case that at and in Stoddard County, Missouri, on or about one o'clock of the morning of January —, 19—, on Missouri State Highway No 25, between the towns of Bernie and Dexter, one H T. was then and there an officer or employee of the defendant corporation and was then and there operating in a northerly direction and having control of and being in charge of a certain H——— automobile belonging to the defendant corporation; and you further find and believe that at the said time and place, the plaintiff was then and there riding in a certain F——— automobile owned and operated with the highest degree of care, by one R. H. K, also in a northerly direction over said Missouri State Highway No 25, and you further find and believe that the said H——— automobile of the defendant corporation was then and there stopped or standing in the center of the pavement of said Highway No. 25, and you further find and believe that said H——— automobile did not then and there between the hours of one-half hour after sunset and one-half hour before sunrise have then and there on the left-hand side of the rear of said H——— automobile, a red light properly equipped and burning and casting a red light in the rear thereof so that said light could be seen a reasonable distance by others approaching from the rear; and you further find and believe that the said automobile of R. H. K in which the plaintiff was then and there riding collided with the said H——— automobile of the defendant and that as a result thereof the plaintiff was injured, and if you further find and believe that the injury of the plaintiff so sustained, if any, was the proximate or direct result of defendant's negligence, carelessness, and unlawfulness in failing to provide and burn a red light on the rear of defendant's said automobile, if you find such to be the fact, then your verdict should be for the plaintiff and against the defendant, unless you find for the defendant on some other instructions given by the court in this case.<sup>50</sup>

#### New York

If the chauffeur left his truck with the switch turned off, the emergency brake set, and the front wheels turned in toward the curb, and went into the market, and while he was in the market, some boys started the truck, then neither the E S L. P M, Inc, or the F P P. Co, Inc, can be held liable for the death of plaintiff's intestate.<sup>51</sup>

#### North Dakota

It is the duty of any person driving a truck upon a highway

<sup>50</sup> *Junk v Tucker Transp Co* (MoApp), 52 SW2d 570

<sup>51</sup> *Maloney v Kaplan*, 233 NY 426, 135 NE 838, 26 ALR 909

to take the same precautions that I have charged you in reference to all other persons, and if anyone stops upon a highway for any cause, whatever it may be, such person stopping must take the necessary precautions to avoid an accident on account of such stoppage <sup>52</sup>

Ohio

Now, the duty of the driver of the truck, and the position in which he placed it, was to exercise the ordinary and reasonable care that an ordinary, reasonable and prudent man placed under the same or similar circumstances would have exercised to avoid endangering the safety of others by the course that he was pursuing

Would you, as ordinarily reasonable, prudent men and women, had you been placed under the same circumstances as was this driver, have thought it necessary to place a signal or a watchman or a guard of some kind to occupy a position on this truck to notify this child, or other persons passing around, of the danger in going through this street, or of the approach of automobiles or other vehicles that might have been coming? If ordinary care and prudence would not have suggested this under the circumstances, then there is no negligence in this case on the part of the defendant <sup>53</sup>

Washington

(1) Under all of the surrounding circumstances, it was the duty of the driver of the bus to operate it at such speed and have it under such control as that, by exercising reasonable care, he could stop it after he could or should, by the assistance of his headlights, have seen the truck on the road ahead of him. <sup>54</sup>

(2) It was material, as bearing on the question of the negligence of Mrs. G, for Mrs. G to show her motive and belief arising out of her conduct in the operation of the automobile which she was driving when the defendant H. D, under the attendant circumstances, attempted, if you find such to be the fact, to flag the car driven by the plaintiff Mrs. G <sup>55</sup>

(3) If the defendant driver actually saw the truck of the plaintiff and should have appreciated the danger of the situation, and failed to exercise reasonable care to avoid the collision, the jury should find for the plaintiff, although the plaintiff was

<sup>52</sup> Billingsley v McCormick Transfer Co., 58 ND 921, 228 NW 427

<sup>53</sup> Dennison Coal & Supply Co v Bartelheim, 122 OhSt 374, 171

NE 835

<sup>54</sup> Colvin v Auto Interurban Co., 132 Wash 591, 232 P 365

<sup>55</sup> Gaches v. Daw, 168 Wash 162, 10 P2d 1111.



guilty of negligence that continued up to the instant of the injury. If the defendant driver did not actually see the peril of the plaintiff in time to have avoided the injury, but by keeping a reasonably careful lookout commensurate with the dangerous character of the vehicle he was driving and the situation then and there existing, should have seen the peril and appreciated it in time, by the exercise of reasonable care to have avoided the injury, and the failure to escape the injury resulted from his failure to keep that lookout and exercise that care, then and in that event the defendant is liable in this action and you must find for the plaintiff, although the plaintiff may have been guilty of negligence, providing such negligence of the plaintiff, if any, had culminated in a situation of peril from which he could not by the exercise of reasonable care have extricated himself.<sup>56</sup>

#### Wisconsin

If the automobile of the defendant S became disabled on the street so that he could not remove it or so that its lights would not function, it became his duty to exercise reasonable diligence promptly to provide an adequate light to apprise travelers of the presence of the wreck and also promptly to procure efficient means for the removal thereof within a reasonable time. He could not relieve himself from such liability for failure to promptly perform those duties by delegating the performance thereof to another. You will determine what the facts are. Was the automobile disabled so that it could not be promptly removed? Did its lights function, or had the lights been turned off? What was the condition as it existed there? Did the defendant S attempt promptly to remove the automobile from the position in which it was left after it collided with the plaintiff's automobile? He was not required to do that which was impossible, but did he exercise reasonable diligence and did he act promptly and did he do all that he could do, or was he negligent? Did he fail to perform his duty in that regard?<sup>57</sup>

#### § 470. — Lights.

##### Alabama

(1) The court charges the jury that Title 36, section 46(b) of the 1940 Code of Alabama, as last amended, reads as follows:

[Statute requiring lights, rear and front, on parked automobiles, during the night.]

<sup>56</sup> Chapin v Stickel, 173 Wash 174, 22 P2d 290

<sup>57</sup> Felix v Soderberg, 207 Wis 76, 240 NW 836

The court further charges the jury that a violation of said section of the Code of Alabama is negligence as a matter of law, and if you are reasonably satisfied from the evidence that on the occasion mentioned in plaintiff's complaint, the plaintiff violated said section of the Code of Alabama and that such violation, if any, proximately contributed to his alleged injuries and damages then you cannot return a verdict in favor of the plaintiff and against the defendant under count 1 of the complaint.<sup>58</sup>

(2) The law of the state requires when a truck or motor vehicle is parked on the highway it shall be equipped with lights as defined to you by the court and if the defendant company parked this truck on the highway in a manner contrary to law in violation of the highway code of Alabama, then the law says they were negligent as a matter of law. In other words, violation of the law with reference to the operation of motor vehicles on the highways of Alabama makes them guilty of negligence per se. The law takes away from you the right to say whether it was negligence on the part of the defendant to park the truck without complying with the law. If they did not comply with the law with reference to parking trucks on the highway, then the law says that they were negligent per se.<sup>59</sup>

#### Connecticut

The absence of a red light on the rear end of the S. vehicle does not of itself prevent a recovery by the plaintiff in this action. If there was plenty of light so one could readily distinguish the presence of the S. automobile stationed where it was, if he was proceeding in the exercise of due care, then it would be entirely immaterial whether or not there was a red light on the car, and the duty would clearly be on the operator of an approaching car to avoid striking it. Further, if this car was stopped in a place where the surrounding electric lights would make it visible within 200 feet to anybody approaching it, then the statute laws [§ 14.87] of this state did not require that the red light should be lighted.<sup>60</sup>

#### Delaware.

The plaintiffs contend that the defendant at the time of the accident had stopped its motor vehicle on the paved portion of the public highway known as the duPont Boulevard, in violation of the statutes of this state. If it had, then we say to you that such violation would constitute negligence on the part of the defendant, and it would be liable in this action, if such negli-

<sup>58</sup> Chastain v Brown, 263 Ala 440, 82 S2d 904

<sup>59</sup> Newell Contracting Co v Berry, 223 Ala 111, 134 S 868

<sup>60</sup> Shea v Hemming, 97 Conn 149, 115 A 686 Changed to conform to subsequent amendments, 1949 Rev, S 2434.

gence was the cause of an accident and the plaintiffs' own negligence did not contribute thereto. The defendant contends that it violated no statute, but that if there was a violation of the statute, whether, as alleged by the plaintiffs, no red light projected from the rear of the truck, or because a lookout was not maintained, nevertheless such violation did not cause the accident because there was sufficient daylight to enable the plaintiffs to see the truck standing in the road. It is for you to say whether there has been a violation of any statute, and if so, whether such violation did cause the accident.<sup>61</sup>

#### Illinois

You are instructed that in this case plaintiffs charge that certain acts and omissions on the part of defendant at the time and place of the accident in this case constituted negligence on his part which was the proximate cause of the injuries and damage claimed by plaintiffs, and that the acts and omissions charged are

That defendant (a) negligently, recklessly and carelessly left his motor truck loaded with livestock standing headed in a southerly direction upon a public highway without displaying a light on the rear of the truck.

That defendant (b) parked his motor truck, loaded with cattle and hogs, unattended upon a portion of the main traveled part of the public highway, when it was then and there practical to park the vehicle off of such part of the highway.

And that defendant (c) negligently, carelessly and recklessly failed to drive his motor truck from and off the public highway into the private driveway of his residence.

You are further instructed that unless you believe from the greater weight of the evidence that the defendant was guilty of one or more of these charges, and that the same constituted negligence upon the part of the defendant which was the proximate cause of the accident, then, you are instructed that plaintiff cannot recover.<sup>62</sup>

<sup>61</sup> *Island Exp, Inc v Frederick*, 5 W W Harr (35 Del) 569, 171 A 181

<sup>62</sup> *Smith v Seelbach*, 336 IllApp 480, 84 NE2d 684

In the case cited, several minor plaintiffs were riding in an automobile driven by one of them, a boy about twenty years of age. They passed another car driving in opposite direction, and struck the rear end of defendant's truck which

was parked and headed in the same direction in which plaintiffs were traveling. There was conflicting evidence as to whether the rear lights on the truck were burning, and also as to whether the truck was parked on the traveled portion of the highway or on the shoulder. The jury found against the plaintiffs, and judgment on the verdict was affirmed.

**Indiana**

You are instructed that it is the law [§ 47-2204, Burn's Ann Ind Stat. (1959 Supp.)] of this state that every motor vehicle, trailer, semi-trailer and the pole trailer, and any other vehicle which is being drawn at the end of a train of vehicles, shall be equipped with at least one (1) tail lamp mounted on the rear, which, when lighted, shall emit a red light plainly visible from a distance of five hundred (500) feet to the rear, and that the law includes motor vehicles at rest temporarily or parked upon the traveled portion of a public highway as well as those in motion. You are instructed further that the law [§ 47-2202] requires that such tail lights shall be lighted at any time from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred (500) feet.

If you find from the evidence in this case that the trailer of the defendant was parked on U S. Highway No. 12 at the time of the accident, as alleged in the complaint, between a half hour after sunset and a half hour before sunrise, or at a time when there was not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred (500) feet, and if you further find that a tail light was not burning on the trailer so as to be plainly visible from a distance of five hundred (500) feet to the rear, and that the lack of such light was a proximate cause of the collision and the resulting injury, then, you are instructed that the defendant was guilty of negligence.

You are instructed that the law requires every person to exercise that degree of care for the safety of other persons and property that a reasonably prudent person would exercise under like or similar circumstances. In other words, a person is required to use a reasonable amount of care in the use of property so as not to injure the person or property of another.

You are instructed that a person must exercise ordinary care for his own safety or be guilty of negligence. If that negligence is a proximate cause of his own injury, he is guilty of contributory negligence.

The question of contributory negligence must be determined from the facts and circumstances in each case. A driver does not have an absolute duty to equip his vehicle with such lights and to proceed at such speed, and observe the way with such care, that he will see any dangerous obstruction in the highway and stop before collision and injury to himself, or be chargeable with negligence contributing to his own injury. A

traveler upon a highway regularly used by the public has a right to assume that the way is reasonably safe for ordinary travel, and, though he must use his faculties in an ordinary manner to discover dangers, he is not required to anticipate extraordinary hazards, nor to expect and search for unusual dangers constantly.<sup>63</sup>

#### North Dakota

If you find from all of the evidence in this case, that the truck was parked upon the highway, as is claimed, and that there were no rear lights on it, and you further find that the plaintiffs could not have seen and would not have seen the truck until they were directly up to it or within a short distance, and could not have seen it, under the conditions of the weather and the like that have been testified to, in time to avoid the accident, and you further find that they were driving at a reasonable rate of speed with their car well under control, as an ordinarily prudent man would have driven, at the time, and under the conditions and circumstances at the time and place, and under such control as an ordinarily prudent person would have had his car, and the accident occurred without any fault on the part of the plaintiffs, and was due to the fact that the truck was parked on the highway and without rear light, then and in that case, the plaintiffs and each of them would be entitled to recover.<sup>64</sup>

#### Ohio.

The statute of this state provides:

[Reading Ohio R.C. § 4513.28 A].

If you find by a preponderance of the evidence that defendant H T. Company violated the provisions of the above section of law in respect to immediately placing a lighted fuse on the roadway at the traffic side of such vehicle, then such violation of said law would be negligence in itself, or if you find by a preponderance of the evidence that defendant, H T. Company, violated the provisions of the above quoted law in respect to placing as promptly as possible three lighted flares on the roadway, then such violation of said law would also be negligence in itself, and you will then consider the question of whether or

<sup>63</sup> Associated Truck Lines, Inc v Velthouse, 227 Ind 139, 84 NE2d 54

In the case cited, it was charged that the plaintiff's decedent, while operating a motor vehicle, collided with defendant's truck which, it was alleged, was parked on the traveled

portion of the highway at night without lights, or other warning. Judgment on verdict for plaintiff was affirmed.

<sup>64</sup> Billingsley v McCormick Transfer Co, 58 ND 921, 228 NW 427

not such negligence, in either or both respects, was the proximate cause of the injuries complained of.<sup>65</sup>

§ 471. — Place.

Arkansas

You are instructed that persons using the highways of this state are required to observe the laws with respect to traffic and highway usage in general. It is unlawful for them to do any act forbidden, or fail to perform any act required, by the highway traffic statutes of this state.

You are further told that upon any highway outside of a business or residence district in this state, no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of such highway, but in every event a clear and unobstructed width of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of two hundred (200) feet in each direction upon such highway [Ark Stats § 75-6476b].

Therefore, if you find from a preponderance of the evidence that A. E. C., while on duty for his employer, ——— Bus Lines, Inc., stopped the passenger bus on the paved, improved, or main traveled part of Highway Number 61 when it was practical to stop it off such portion of said highway; or, if you find from a preponderance of the evidence that he stopped said bus in such position that there was not remaining a clear and unobstructed width of the highway opposite his bus for the free passage of other vehicles, then you are instructed that this is evidence of negligence on the part of the said A. E. C. and ——— Bus Lines, Inc., which may be considered by you, along with all other facts and circumstances revealed by the evidence, in determination of their ultimate liability or nonliability to all persons injured or damaged by their acts in this connection.<sup>66</sup>

California

(1) If you find that the truck was unlawfully parked on the concrete portion of the highway, the burden would then rest upon the defendants to show affirmatively that such parking was necessary under the circumstances of the case.

<sup>65</sup> Bush v Harvey Transfer Co., 146 OhSt 657, 33 OhOp 154, 67 NE2d 851

<sup>66</sup> American Bus Lines, Inc v

Merritt, 221 Ark 596, 254 SW2d 963  
The instruction has been changed to conform to 1959 Amendments, Acts 1959, No 307, § 37, p 1413

The driver of a truck is not guilty of negligence if his machine is parked on the main-traveled portion of the highway through no fault of his own. If the automobile is disabled while it is traveling along a public highway so that it is impracticable or impossible to drive it off the main-traveled portion of the highway, the driver is not guilty of negligence in permitting it to remain there until, by the exercise of reasonable diligence, it can be removed.<sup>67</sup>

(2) You are instructed that the common meaning of the word "curb" as applied to a state highway is a stone or row of stones or similar construction of concrete, wood or other material along the margin of the highway set aside for vehicular use and restraint and protection to the adjoining sidewalk space.

You are instructed that section 22502 of the 1959 Vehicle Code of the state of California in full force and effect at the time of the occurrence of this accident insofar as it is pertinent to this action reads as follows: "Except as otherwise provided in this chapter every vehicle stopped or parked upon a roadway where there are adjacent curbs shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within eighteen inches of the right-hand curb." The above vehicle section just quoted is only applicable if you first find that the state highway at the point where the accident occurred was actually bounded by curbs within the definition of the same as given to you by the court.

Conduct which is in violation of section 22502 of the Vehicle Code of the state of California just read to you, constitutes negligence per se, that is, negligence as a matter of law. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he (or she) was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise.

You have been instructed that conduct which was in violation of certain sections of the Motor Vehicle Code just read to you constitutes negligence per se, that this means that if the evidence

<sup>67</sup> *Silvey v. Harm*, 120 CalApp 561, 8 P2d 570

supports a finding, and you do so find that a person did so conduct himself, it requires a presumption that he was negligent. In this connection, you are further instructed that such presumption is not conclusive, that it may be overcome by other evidence tending to show that under all the circumstances surrounding the event, the conduct in question is excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence.<sup>68</sup>

#### Kansas

If you find by a preponderance of the evidence that defendants' car was stopped or parked on the paved portion of the highway in such position as to obstruct the line of traffic thereon, and if you find that by reason thereof, plaintiff received injury and damage, to which he did not negligently contribute, then such circumstances constituted *prima facie* negligence on the part of defendants.<sup>69</sup>

#### Kentucky

The jury is further instructed that if they do not believe that the said car of the defendant was protruding on the highway, then they should find for the defendant.

If the jury believe that the said car was protruding on the highway, but that the same did not interfere with the said M in driving his car mentioned in the evidence along said highway, if he were driving said car in a reasonably prudent manner, considering the condition of the road whether wet, slippery or dry, then the jury should find for the defendant.

If the jury believe that said car of the defendant protruded on the highway at the place mentioned in the evidence, but that said car being in said position was not the direct and proximate cause of the car in which plaintiff's intestate was riding being overturned, then you should find for the defendant.<sup>70</sup>

#### Minnesota.

The statutes of Minnesota provide:

[Reading M. S. A. § 169.32]

There is no doubt that when the S. Oil Company truck was parked north of the bridge the driver did not leave 20 feet of the traveled portion of the highway opposite the parked truck open for the passage of other vehicles. However, if you find that the only evidence of negligence on the part of the S. Oil

<sup>68</sup> Dunn v Russell (CalApp), 234 P2d 270

<sup>69</sup> Sponable v Thomas, 139 Kan 710, 33 P2d 721

<sup>70</sup> Suter's Admr v Kentucky Power & Light Co., 256 Ky 356, 76 SW2d 29



Company was that the truck was parked in violation of said statute and if you further find that such parking was reasonably excusable or justifiable under all the facts and circumstances as brought out in the evidence, such violation of such statute would not constitute a negligent act and there could be no verdict against the S. Oil Company based upon a violation of such statute. However, let me repeat, the test would not be the driver's sincere and possibly honest belief that a statutory violation was in the best interests of safety but rather whether, in the light of the facts and circumstances, his act in violating the statute in the interests of safety was such as would have been taken by an ordinary, careful, prudent person acting under the same or like conditions.<sup>71</sup>

Ohio.

A statute of this state provides:

[Reading Ohio R.C. § 4511.66]

If you find by a preponderance of the evidence that defendant H T Company violated the provisions of the above quoted section of law in respect to stopping, parking or leaving its equipment on the highway, then such violation of the law would be negligence in itself, and if you find that such negligence was the proximate cause of the injury to the plaintiff, your verdict should be for the plaintiff [unless you also find that the plaintiff himself was guilty of negligence which directly and proximately contributed to his injury]<sup>72</sup>

Washington.

(1) A driver on the highway has a right to presume that drivers ahead will not unlawfully stop within the improved portion of the highway, and he may indulge such assumption unless and until he sees, or in the exercise of reasonable caution on his part should see, appearances to the contrary.<sup>73</sup>

(2) If the defendants stopped their automobile on the highway in a stationary position in the middle thereof, and there was sufficient space on the right-hand side of the vehicle for other vehicles to pass safely, then Mrs. G., in approaching this standing automobile from the rear, had a legal right to use the unoccupied portion of the roadway on the right-hand side of the standing vehicle, if it was so standing, as long as she exercised

<sup>71</sup> *Leman v. Standard Oil Co.* of Indiana, 246 Minn. 271, 74 NW2d 513, 146 OhSt. 657, 33 OhOp. 154, 67 NE2d 851.

<sup>73</sup> *Lindsey v. Elkins*, 154 Wash.

<sup>72</sup> *Bush v. Harvey Transfer Co.*, 588, 283 P. 447.

such care as a reasonably prudent person, similarly situated, would have used, and such as the circumstances required.<sup>74</sup>

#### Wisconsin

Many regulations are provided by the statutes of the state of Wisconsin for the safe operation of motor vehicles on the public highways of the state. The operator of any motor vehicle who disobeys any such safety statute is guilty of negligence.

In connection with this question you are instructed that the statutory law of Wisconsin provides: "Sec 85 19 Parking, stopping or standing. (1) Parking on Highway. No person shall park, stop, or leave standing any vehicle, whether attended or unattended, upon any highway outside a business or residence district when it is practical to park, stop or leave such vehicle standing off the roadway of such highway, provided that in no event shall any person park, stop or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of no less than fifteen feet upon the roadway of such highway opposite such standing vehicles shall be left for the free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in each direction along such highway."

This is a safety statute and failure to comply with it is negligence. In answering this question, you will take into consideration the oral testimony, the physical facts, such as the position of the cars after the first collision and prior to the second collision, the width of the roadway and the condition of the roadway, position of the cars after the second collision, and the time that elapsed between the first and second collision and any other physical facts that may be relevant to the determination of this question.<sup>75</sup>

#### § 472. — Brakes.

If the jury find from the evidence that the driver did all that a reasonably prudent man should do under the circumstances to secure the truck from moving while being loaded, and it was through no fault of either the driver or his helper that the accident happened, your verdict should be for defendant.<sup>76</sup>

<sup>74</sup> *Gaches v Daw*, 168 Wash 162, 10 P2d 1111

<sup>75</sup> *Puccio v Mathewson*, 260 Wis 258, 50 NW2d 390. In this case it was not error to fail to instruct regarding Stat 1949, § 85 19 (8) [dis-

abled automobiles] since no such request was made nor would the evidence support the giving of such an instruction.

<sup>76</sup> *Gyarmati v Linde Air Products Co*, 305 Pa 188, 157 A 485

### § 473. Automobiles pushing or pulling another vehicle.

#### Indiana

No negligence can be imputed to the plaintiff for the speed and manner in which the automobile towing the motorcycle was driven, unless plaintiff exercised some control over the automobile.

The driver of a motor vehicle towing another motor vehicle, must use reasonable and ordinary care in the driving of said motor vehicle, such as a reasonably prudent person would use under the same or like circumstances, considering the dangers to be avoided, and such care must be commensurate with the dangers to be anticipated and avoided

It is the duty of the driver of a motor vehicle towing another motor vehicle to drive said motor vehicle at a reasonable rate of speed so as not to injure the person riding in the towed motor vehicle

I instruct you that it was the duty of the plaintiff, A., to exercise reasonable and ordinary care in guiding and operating the motorcycle in which he was riding and which was being towed by the defendant, P, in his automobile, if you find from the evidence that such were the facts. A failure on the part of said plaintiff to exercise such reasonable and ordinary care would constitute contributory negligence on his part and if such contributory negligence proximately contributed to his injuries, then and in that event, the defendants can not be held liable for such injuries.<sup>77</sup>

#### Pennsylvania.

Did they or did they not cause that trailer to be operated without lights, and if they did, and if your minds are so satisfied by the weight of the testimony, the court would then say to you that that would be evidence of negligence.<sup>78</sup>

### § 474. Police vehicles.<sup>79</sup>

#### Connecticut.

The measure of the plaintiff's conduct would be that of an ordinarily prudent and careful motorcycle police officer in the

<sup>77</sup> *Aglamis v Hughes*, Circuit Court, Marion County, Indiana, No 32758

<sup>78</sup> *Nevin Bus Line, Inc v Paul R Hostetter Co*, 305 Pa 72, 155 A 872

<sup>79</sup> Annotations on responsibility

of city for acts of employees, see § 484

Vehicles operated by policemen, sheriffs, and constables are involved in the following cases

Alabama. *Swift & Co v Payne*, 223 Ala 25, 134 S 626

performance of his duty of patrolling the streets, taking into account the statutory provisions and the circumstances surrounding him

Obviously the conduct of a police officer in pursuit of a lawbreaker should be looked upon by a jury in the light of all the circumstances which the evidence shows to have surrounded him but he must exercise that degree of care which a reasonably prudent man would have exercised if engaged in the same endeavor under the same circumstances. In this case, the plaintiff was admittedly a police officer patrolling his beat but there is no evidence that he was pursuing anyone \* \* \* The same may be said of his duty to keep a careful lookout. It is the duty of all users of the highway and especially those in charge of vehicles such as are concerned in this collision to make use of the public highway in a careful manner and to keep a careful lookout for danger of collisions of all kinds \* \* \* The measure of care to be exercised under any given set of circumstances is for the jury to determine.<sup>80</sup>

**California** *Sacramento v Hunger*, 79 CalApp 234, 249 P 223, *Spencer v. Schiffman*, 119 CalApp 746, 7 P2d 361; *Falasco v Hulen*, 6 Cal App2d 224, 44 P2d 469, *Rocha v Hulen*, 6 CalApp2d 245, 44 P2d 478

**Colorado** *Johnsen v Baugher*, 92 Colo 588, 22 P2d 855

**Connecticut** *Heimer v Salisbury*, 108 Conn 180, 142 A 749

**Delaware**. *Brown v Wilmington*, 4 Boyce (27 Del) 492, 90 A 44

**Georgia** *Hudson v Carton*, 37 GaApp 634, 141 SE 222

**Kansas**. *Koger v Keller*, 120 Kans 196, 243 P 294

**Minnesota** *Edberg v Johnson*, 149 Minn 395, 184 NW 12, *Hogle v Minneapolis*, 193 Minn 326, 258 NW 721

**Missouri**. *Hogan v Fleming*, 218 MoApp 172, 265 SW 875

**New Jersey**. *Desmond v Basch & Greenfield*, 94 NJL 52, 108 A 362

**New York**. *Miner v Rembt*, 178 AppDiv 173, 164 NYS 945, *Lacock*

*v Schenectady*, 224 AppDiv 512, 231 NYS 379

**Pennsylvania** *Graff v McKeesport*, 316 Pa 263, 175 A 426, *Morris v Philadelphia Gas Works Co*, 317 Pa 420, 176 A 735, *Rommel v American Stores Co*, 103 Pa SuperCt 384, 157 A 493

**South Carolina** *Lineberger v Greenville*, 178 SC 47, 182 SE 101

**Texas** *Keevil v Ponsford* (Tex CivApp), 173 SW 518, *Hampton Co v Joyce* (TexCivApp), 80 SW 2d 1066, *Hubb Diggs Co v Bell*, 116 Tex 427, 293 SW 808, certified questions answered (TexCivApp), 297 SW 682

**Washington** *Clark v Wilson*, 108 Wash 127, 183 P 103, *State v Gorham*, 110 Wash 330, 188 P 457, 9 ALR 365, *Carpenter v Thomas*, 164 Wash 583, 3 P2d 1001

**Wisconsin**. *Foster v Bauer*, 173 Wis 231, 180 NW 817, *Suren v Zuege*, 186 Wis 264, 201 NW 722

<sup>80</sup> *Heimer v Salisbury*, 108 Conn 180, 142 A 749

### § 475. Vehicles used for fighting fire or rescuing property from fire.<sup>81</sup>

#### Minnesota

The law, however, gives precedence to fire apparatus. And in connection with fire apparatus going to a fire, it is the duty of everyone who sees it or is in a position to see it, or can see it, or who under the circumstances should see it, to yield the right of way to that fire apparatus.<sup>82</sup>

#### New Jersey

If the driver of the fire apparatus chose, as the term is, the lesser of two evils, and thereby the collision in question was occasioned solely by reason thereof, then there can be no recovery as against the defendant. If, in exercising his judgment at the moment, he erred and made a mistake, I am obliged to say to you that you could not hold him therefor for contributory negligence and if that situation so called upon him to exercise that judgment, there would be no negligence on his part; in other words, if he found himself in that situation while driving that truck as the result of negligence of defendant's driver, bearing in

<sup>81</sup> Vehicles used for fighting fire or rescuing property from fire are involved in the following cases

Federal Puget Sound Elec R Co v Benson, 165 CCA 304, 253 F 710

California Balthasar v Pacific Elec R Co, 187 Cal 302, 202 P 37, 19 ALR 452, Grassie v American LaFrance Fire Engine Co, 95 Cal App 384 272 P 1073, Armas v Oakland, 135 CalApp 411, 27 P2d 666, 28 P2d 422

Florida Maxwell v Miami, 87 Fla 107, 100 S 147, 33 ALR 682

Louisiana. Board of Comrs New Orleans Fire Dept v Crystal Creamery, 3 LaApp 327

Maine McCarthy v Mason, 132 Me 347, 171 A 256

Minnesota Hubert v Granzow, 131 Minn 361, 155 NW 204, Ann Cas 1917D, 563

Nebraska. Goeres v Goeres, 124 Neb 720, 248 NW 75

New Hampshire Vandell v Sanders, 85 NH 143, 155 A 193, 80 ALR 550

New Jersey Brockstedt v Meltzer (NJ), 111 A 812

New York. Garrett v Schenectady, 268 NY 219, 197 NE 257, revg 242 AppDiv 880, 275 NYS 847, rearg den in 268 NY 708, 198 NE 569, Farrell v Fire Ins Salvage Corps, 189 AppDiv 795, 179 NYS 477; Lacock v Schenectady, 224 AppDiv 512, 231 NYS 379, Hardin v Schenectady, 154 Misc 411, 278 NYS 28

Texas Eastern Texas Elec Co v Hunsucker (TexCivApp), 280 SW 887

Utah. Rollow v. Ogden City, 66 Utah 475, 243 P 791

Vermont. Ferraro v Earle, 105 Vt 243, 164 A 886

Washington. Benefiel v Eagle Brass Foundry, 154 Wash 330, 282 P 213; Hartnett v Standard Furn Co 162 Wash 655, 299 P 408

Wisconsin Sutter v Milwaukee Bd of Fire Underwriters, 164 Wis 532, 160 NW 57, reh den in 164 Wis 532 160 NW 1034

Wyoming White v Casper, 35 Wyo 371, 249 P 562

<sup>82</sup> Ring v Minneapolis St R Co, 173 Minn 265, 217 NW 130.

mind what I have said to you about contributory negligence, there could be no recovery.<sup>83</sup>

#### Washington

Persons in control of fire apparatus belonging to the city fire department are not required to observe the ordinary speed limit fixed by ordinance for vehicles traveling upon the public streets<sup>84</sup>

### § 476. Ambulances.<sup>85</sup>

#### Alabama

The court charges you that a person driving a vehicle—in this case it was an ambulance—is presumed to be the agent, servant or employee of the owner thereof, and is presumed to be acting within the line and scope of his employment as said agent, servant or employee during the driving of said ambulance. That is a presumption against the owner of the ambulance who lets other people drive the ambulance

That presumption may be overcome by evidence to the satisfaction of the jury. In other words, if the jury believe from the evidence that the ambulance driven in this case belonged to the defendants, or either one of the defendants, the party driving said ambulance at the time of the injury would be presumed to be the agent of the owner of the ambulance, and to be acting within the line and scope of his employment. That would be a presumption which might be overcome by evidence which must reasonably satisfy the jury that he was not such agent<sup>86</sup>

<sup>83</sup> Morris Tp v Joseph Harris & Sons, Inc (NJSupCt), 143 A 817

<sup>84</sup> Hartnett v Standard Furniture Co, 162 Wash 655, 299 P 408

<sup>85</sup> Ambulances are involved in the following cases

Alabama Echols v Vinson, 220 Ala 229, 124 S 510

Arkansas Healey v Balmat, 189 Ark 442, 74 SW2d 242

California. Godeau v Levy, 72 CalApp 13, 236 P 354, Rogers v Los Angeles, 6 CalApp2d 294, 44 P2d 465

Connecticut. Leete v Griswold Post, No 79, American Legion, 114 Conn 400, 158 A 919

Indiana. Gaines v Taylor, 96 IndApp 378, 185 NE 297

Michigan. Ozga v Clock, 266 Mich 58, 253 NW 215

New York Van Ingen v Jewish Hosp, 182 AppDiv 10, 169 NYS 412, affg 99 Misc 655, 164 NYS 832, affd in 227 NY 665, 126 NE 924

Oregon. West v Jaloff, 113 Or 184, 232 P 642, 36 ALR 1391, Buck v Ice Delivery Co, 146 Or 132, 29 P2d 523

Pennsylvania Asher & Son v Warner Co, 103 PaSuperCt 569, 158 A 292

Texas Lamar & Smith v Stroud (TexCivApp), 5 SW2d 824, Grammer-Dismukes Co v Payton (Tex CivApp), 22 SW2d 544, Wichita Falls Trac Co v Jeter (TexCiv App), 48 SW2d 372

<sup>86</sup> Jefferson County Burial Soc v Cotton, 222 Ala 578, 133 S 256

California.

In connection with instructions that will follow concerning negligence, the duties of drivers of vehicles on a highway, and laws regulating the driving of vehicles and the use of highways, you will keep in mind that they have no application to the driver of the emergency vehicle involved in this case if you should find facts which, under the court's instructions, entitle him to the exemption heretofore mentioned, and if you should further find that he was not guilty of arbitrary exercise of the privileges included in that exemption.

Our statutes [California Vehicle Code, §§ 21055, 21056] provide that, under certain conditions, the driver of an authorized emergency vehicle shall be exempt from, and shall not be required to observe, certain laws that generally apply to the drivers of vehicles on public streets or highways. It will be sufficient at this time to state that the laws to which said exemption applies are those which regulate speed, the use of different lanes on the highway, overtaking and passing of other vehicles, rights of way, rights and duties with respect to pedestrians, streetcars, safety zones, stops, standing and parking

It follows that when there exist the conditions which said statutes require as a basis for said exemption, it is not negligence for the driver of such an emergency vehicle to disregard the rules from which he thus is exempted, unless he is guilty of an arbitrary exercise of the privileges embraced in that exemption.

It is equally important to note, however, that the exemption does not apply if any one of the conditions upon which it is based is, in fact, absent, and in such a case, the driver of the emergency vehicle has no privileges over other drivers on the highway, it then is his duty to obey the laws that apply generally to the use of the highway; and he is held to the same duty of exercising ordinary care.

The conditions heretofore mentioned as being necessary in order that said exemption may prevail are these:

First, that the vehicle is being driven in response to an emergency call, or that it is being used in the immediate pursuit of an actual or suspected violator of the law, or that it is going to a reported fire, or to a locality where a fire was indicated to be, in response to a fire alarm.

Second, that the driver sounds a siren in a way that is reasonably necessary to give warning of his approach to others.

Third, if the vehicle is being driven at night, that it is equipped with at least one lighted lamp displaying red light to the front.

Even when such conditions exist, it is negligence if the driver of an emergency vehicle is guilty of an arbitrary exercise of the privileges given him by the exemption. But that term "arbitrary exercise of the privileges," is not one that you may interpret or apply as you wish. It has a restricted meaning under the law, and your close attention to it is urged

An arbitrary exercise of the privileges given by the aforesaid statute takes place when, and only when, the driver of an authorized emergency vehicle does something which would constitute negligence if he did not enjoy the exemption, and when one or both of the two sets of circumstances now to be described also exist

One Said vehicle is not being driven in response to an emergency call and is not being used in the immediate pursuit of an actual or suspected violator of the law and is not being used in going to a reported fire, or a locality where a fire is indicated to be, in response to a fire alarm.

Two. After seeing that some other person has not heard or heeded the warning given, or seeing that no one is in charge of property in his path that otherwise might be moved, or seeing that there is no way in which any other person can reasonably be expected to prevent a collision, the driver of the emergency vehicle, nevertheless, having both the means and reasonable opportunity to avoid such a result, proximately causes an accident producing injury to another <sup>87</sup>

Indiana

So, gentlemen, in this case, you are instructed that although the driver of the ambulance was not required to stop as he was approaching or crossing Lincoln Avenue, providing you find he was answering a call as set out in section three of the above ordinance, however, he must use ordinary care and prudence in driving his vehicle to avoid collision with other vehicles which may be at the same time using the highway. The driver of an ambulance must keep his motor vehicle under control and when reasonably possible, avoid collision with other vehicles on the streets or highways.

The operator of an ambulance does not have the right to intentionally run into or damage another vehicle even though the other party had unlawfully or inadvertently interfered with the ambulance, but it would be the duty of the driver of the ambulance in that event to use such care and control as he reasonably

<sup>87</sup> Duff v Schaefer Ambulance Service, 132 CalApp2d 655, 283 P2d 91.



could to avoid collision, such care as a reasonably careful and prudent man would use under the same or similar circumstances. If he used such care on such occasion and could not avoid collision, then he would not be responsible therefor.<sup>88</sup>

New York

If you find that the speed of this ambulance was the proximate cause of the accident, and also find that B., the orderly of the hospital, participated by direction or interference or suggestion in the speed, or in the cutting around at Robin Street, his act of negligence, if found to be negligent, is chargeable to the hospital.<sup>89</sup>

#### § 477. Vehicles used by physicians and surgeons.

A physician is bound to exercise the same degree of care as any other person, and, if he fails to exercise the degree of care that an ordinarily prudent person would have exercised under the same circumstances, he is guilty of negligence even though he does not violate the provisions of any statute.<sup>90</sup>

#### § 478. Frightening or injuring animals; injuries to animal riders.

Connecticut.

While the so-called rules of the road, such as keeping to the right, etc., apply also to drivers of cattle, yet the practical application of these rules would be quite different as regards the drivers of cattle from that of an automobile driver. Everyone knows that one who is engaged in driving a herd of 12 cattle would have much greater difficulty in keeping them all on the right side of the road than the driver of an automobile, or even the driver of a single cow, would have.

Ordinary care for the plaintiff means that degree of care that an ordinarily prudent and reasonable person would use under similar circumstances. The plaintiff had the right to use this highway for the purpose of driving cattle thereon, provided he exercised reasonable care.

The real test is whether these boys acted as reasonable and prudent men would have done under similar circumstances. Whether it was necessary for one of them to be ahead and

<sup>88</sup> *Gaines v Taylor*, 96 IndApp 378, 185 NE 297

NYS 675.

<sup>89</sup> *Baker v Allen & Arnink Auto Renting Co*, 190 AppDiv 39, 179

<sup>90</sup> *Austin v De George* (TexCiv App), 55 SW2d 585

whether they handled these cows properly are questions of fact for you to determine <sup>91</sup>

#### Indiana

It is claimed by the defendant that the plaintiff, when the team attached to the carriage in which she was riding, turned around in the highway and just before she was injured, stood up in the carriage and jumped, or tried to jump, out of the same; that by so doing, she was guilty of negligence which contributed proximately toward producing the injuries of which she complains; that if she had remained seated in the carriage she would not have been injured, and that she is therefore precluded from recovering in this case. Even though the jury may find from the evidence that the plaintiff, when the team turned around and just before she was injured, if she was, did stand up in the carriage, or did endeavor to get out of the same, and that no injury would have occurred to her if she had remained seated, still if you further find from the evidence that the plaintiff was in a situation of sudden peril, which was brought about by the defendant's negligence, that in standing up in the carriage and in trying to get out of the same she acted under a sudden fright and impulse created by such peril, that in so doing, she acted naturally, and as ordinarily prudent persons might act when in like situations and under the influence of like fright and like impulses, then it will be a question of fact for the jury to determine from the evidence whether she was guilty of contributory negligence in so standing up in said carriage and in trying to get out of the same. <sup>92</sup>

#### Iowa

(1) The court instructs the jury that if you find that the accident complained of was occasioned by the defendant in the operation of an automobile, the next inquiry to be determined is: Was the defendant guilty of any negligence in the operation of said automobile which occasioned said accident? The mere fact, if established, that the plaintiff's team was frightened, and she was thereby injured by the defendant's automobile, is not sufficient. The plaintiff is required to go further and show that in the operation of said automobile, the defendant was guilty of some negligence which occasioned the said injury. <sup>93</sup>

(2) The evidence shows, without controversy, that after the collision, the horse was stopped and under control for a sufficient length of time for M. H. to have alighted from the

<sup>91</sup> *Andriews v Dougherty*, 96 Conn 40, 112 A 700

<sup>92</sup> *McIntyre v Orner*, 166 Ind 57, 76 NE 750, 4 LRA (N S) 1130, 117

AmSt 359, 8 AnnCas 1087

<sup>93</sup> *Cresswell v Wainwright*, 154 Ia 167, 134 NW 594

buggy, had she elected to do so. If, therefore, you find from the evidence that M. H. knew and appreciated the dangers incident to the trip home with said horse and buggy, or if, in the exercise of ordinary care, she should have known and appreciated such danger, and disregarding the same she elected to pursue her journey in such manner, you will be justified in finding that she assumed the risk; and in that event the plaintiff can not recover.

If you find that defendant was negligent as alleged, and as a result of such negligence the horse became frightened, and such fright of the horse continued down to the time of the runaway to such an extent that without such fright the runaway would not have occurred, and in whole or in part because of such fright, the horse ran away and threw M. H. from the buggy, and injured her, the mere fact, if it be a fact, that some other cause, or the act, negligent or otherwise, of some other person, operated in conjunction with the negligence of the defendant to increase the fright of the horse, and to produce such runaway and injury, would not in itself excuse the defendant from liability.

If, however, you find that, after such collision, the horse was again under control, and that some other, independent, and efficient agency intervened and caused the runaway of the horse, you would be justified in finding that the negligence, if any, of the defendant was not the proximate cause of the injury.<sup>94</sup>

(3) It is not claimed by the plaintiff that the automobile collided with the horse and buggy. He does claim, however, that the defendant did not give him half of the road. The law requires that a person proceeding along the public highway with any vehicle must turn to the right and give one-half of the road to a vehicle which he meets. What is meant by one-half of the road is one-half of the traveled track, yet there was no obligation on the part of the defendant to give one-half of the traveled track, provided the plaintiff's horse and buggy were outside of the traveled track and on the east side of the turnpike, as in such case the defendant had the right to run his automobile in the traveled track, provided there was room to pass, and the horse had shown no signs of fright, and even though you find from the evidence that the defendant did not turn to the right and give the plaintiff one-half of the traveled track, still if the accident was not caused by his failure so to do, then the plaintiff could not recover on that ground.<sup>95</sup>

<sup>94</sup> *Herdman v Zwart*, 167 Ia 500,  
149 NW 631

<sup>95</sup> *Needy v Littlejohn*, 137 Ia 704,  
115 NW 483.

**Kentucky.**

(1) It is the duty of a person riding a horse along the highway to exercise ordinary care for his own safety.<sup>96</sup>

(2) The court instructs the jury that if they believe from the evidence that on the occasion plaintiff was injured, the defendants were operating an automobile along the public highway at a speed greater than was reasonable and proper, having regard to the traffic and use of the highway, and if they further believe from the evidence that by reason of that fact, if the jury find it to be a fact, the plaintiff's horse became frightened, and overturned his wagon, whereby the plaintiff was injured, and his property damaged, the jury should find for the plaintiff, and fix the damages according to the third instruction.

The court instructs the jury that unless they believe from the evidence that the defendants were running the automobile at a greater rate of speed than was reasonable and proper, having regard to the traffic and use of the highway, and that by reason of that fact, the plaintiff's horse became frightened, and overturned his wagon, the jury should find for the defendants.<sup>97</sup>

**Missouri**

In this state, horses, buggies, and automobiles enjoy equal rights to the use of our highways. The only distinction made by statute is that the operator of a motor vehicle is required to exercise the highest degree of care, while the driver or rider of a horse is bound to observe only ordinary or reasonable care for the safety of others.

Defendant was obliged to exercise ordinary care in the matter of fastening the tarpaulin on the truck, and, if you find defendant negligent in that respect, and that plaintiff was riding an ordinarily gentle and broken horse, then defendant would be liable, if the frightening of plaintiff's horse was the natural and probable result of such negligence, if any there was.

Although defendant's truck was making no unusual noise for a truck of that kind and although it may have been customary for trucks in the vicinity of Poplar Bluff to be equipped with tarpaulins rolled and fastened over the top of the cab as in this case, nevertheless, if the driver of the truck saw, or by the exercise of due care could have seen, that the horse which plaintiff was riding was showing signs of fright and uneasiness at his approach, and he failed to give heed thereto, but continued to drive on without attempting to use

<sup>96</sup> Fullenwider v Brawner, 224 Ky 274, 6 SW2d 264

<sup>97</sup> East Tennessee Tel Co v Cook, 155 Ky 649, 160 SW 166

the means available in an effort to remove the cause of fright, defendant would be liable, if such failure resulted in injury to plaintiff.<sup>98</sup>

**North Dakota.**

I charge you further that whenever an automobile driver knows, or, in the exercise of ordinary care should know, that his machine by its movement or noise is frightening a horse which he is approaching, so as to render such animal unmanageable, he must use all the care and caution, such as slackening speed which a careful and prudent driver would exercise under the circumstances, to prevent such animal from getting beyond control and to avoid injury.

I charge you further that if you find from a fair preponderance of the evidence in this case that the plaintiff did signal the driver of the said automobile to stop his said automobile, and that said signal was given by plaintiff holding up his hand, and you further find that at the same time the said horse upon which the said plaintiff was riding appeared to the driver to be unmanageable and appeared to be running away, then it was the duty of the defendant to use care and caution to prevent a collision between the said automobile and the said horse.<sup>99</sup>

(2) Now, in this case, if you should find by a fair preponderance of the evidence that the defendant was traveling along the public highway and came to these cattle and saw this last cow, as he testified to, on the side of the road, and in order to get past, and in believing he could get past, he speeded up his automobile and the cow or heifer ran in front of him and was thereby injured, and that the defendant was using ordinary care in traveling on that road to get past them and to avoid the injury, then the defendant in this action is not liable, and you should so say by your verdict, and find your verdict in favor of the defendant.<sup>1</sup>

**Texas**

The court instructs the jury that automobiles are lawful vehicles, and as such are entitled to the privilege of using the public highways. The frightening of teams driven along the public highways caused by the approach of automobiles does not of itself raise any inference of negligence on the part of the drivers of such automobiles. The law contemplates that all sorts of conveyances may use the highways with equal rights;

<sup>98</sup> *Holloway v Barnes Grocer Co*, 345, 230 NW 6  
223 MoApp 1026, 15 SW2d 917

<sup>1</sup> *Armann v. Caswell*, 30 ND 406,

<sup>99</sup> *Schulkey v. Brown*, 59 ND 152 NW 813.

but imposes upon the drivers of every character of conveyance the exercise of ordinary care for themselves and every other person entitled to the use of such highways

The court instructs the jury that if you find and believe from the evidence in this case by a preponderance thereof that on or about August —, 19—, while plaintiff's deceased father was coming to the town of Canadian, driving the team described in plaintiff's petition, and while upon a public highway near the town of Canadian, his said team was approached by an automobile driven by defendant's son, C F, and that said automobile had been placed in the possession of his son, C. F., by the defendant W. D F., and that the said C F. was acting under the direction of, and upon an errand for his said father, W. D. F., and you further find that at said time the said C. F. was inexperienced in the operation and management of said automobile, and you find from the evidence in this case that said C F saw and observed the approach of the team driven by deceased, C C S, and the frightened condition of said team, if the same were frightened, and that said C F continued to approach said team from the front and toward the head of said team, causing them to become more frightened and to turn rapidly in an opposite direction, thereby causing plaintiff's father, the deceased, to be thrown to the ground and injured, as alleged in plaintiff's petition, and that such injuries were the proximate cause of the death of plaintiff's father; and you further find that such acts upon the part of said C. F in approaching said team, or in his failure to stop said machine, if there was such failure, or the placing of said machine in his possession by the defendant, W D F., were all or any of them acts of negligence as the same has hereinbefore been defined to you, and that such negligence, if any, was the proximate cause of the injury complained of, and that deceased was acting with ordinary care for his own safety, then, in the event you so find, you will find for plaintiff damages, the measure of which will be hereinafter charged you <sup>2</sup>

**Virginia.**

You are instructed that if you believe from the greater weight of the evidence that S's horse was prancing sideways and that an automobile was approaching near at hand from the opposite direction, and if you further believe that F saw this, or by using ordinary care should have seen it, and if you further believe that an ordinarily prudent and competent truck driver would not have attempted to pass S. then, under all the circum-

<sup>2</sup> *Riley v Fisher* (TexCivApp),  
146 SW 581.

stances, and if you further believe that F. nevertheless tried to pass S and that the death of S was proximately caused thereby, then you are instructed that the plaintiff is entitled to recover damages from the defendant, and your verdict should be for the plaintiff, unless you further believe that S was himself guilty of negligence which proximately contributed to the accident

The court instructs the jury that if they believe from the evidence that the defendant's driver, F., immediately prior to the happening of the accident was driving his truck carefully and at a reasonable rate of speed and did nothing reasonably calculated to frighten the horse ridden by S., and observed nothing or by the exercise of ordinary care should observe nothing which would indicate to a reasonably prudent person that the horse ridden by S might become excited and uncontrollable, and thereby place S, the rider, in peril, and that the accident was caused by the horse suddenly and unexpectedly turning from its course and crossing the road in front of the truck, and that a reasonably prudent person would not have reasonably anticipated such behavior on the part of such animal under the facts and circumstances proven in this case, and that as soon as F discovered S's peril, or by the exercise of reasonable foresight should have discovered it, he used all reasonable means in his power to stop and to avoid striking the said horse and rider, then the defendant would not be guilty of negligence in this respect and the jury should find for the defendant <sup>3</sup>

Washington.

You are further instructed that the questions of negligence on the part of the defendants on which there has been any evidence whatsoever are: First, on the question of whether the plaintiff in this case, at or about the time his horse became frightened, signaled to the defendant to stop his machine, and if the defendant failed to stop the machine within a reasonable time after receiving such signal, if you believe from the testimony that said signal was so given; and, second, whether or not the defendant, on first observing that the horse behind which plaintiff was riding was frightened, failed to act as a reasonably prudent man should have acted under the circumstances, that is, failed to reduce the speed of the car and failed to use such care as a reasonable and prudent man should have used under all the circumstances. <sup>4</sup>

<sup>3</sup> *Jessee v Slate*, 196 Va 1074, 86 SE2d 821.

<sup>4</sup> *Yttregard v Young*, 77 Wash 523, 137 P 1043.

**§ 479. Collision of motor vehicle with animal-drawn vehicle.****Alabama**

The court charges the jury that if they believe from the evidence that the plaintiff negligently pulled his horse suddenly to the left without notice or warning to the driver of the automobile, while said automobile was so close to the buggy as not to admit of a change in direction by the driver of the automobile, and without reasonable opportunity upon the part of the driver of the automobile to avoid the collision, then you can not find for plaintiff under the first count.<sup>5</sup>

**Iowa.**

If you find that the plaintiff knew that the defendant was immediately behind his buggy with his automobile, and so close that, if he stopped or materially slackened his speed, it would likely result in injury and damage to plaintiff, and, knowing such facts, the plaintiff did suddenly slack his speed or stop his horse, such act would constitute negligence on his part, and he can not recover in this action.<sup>6</sup>

**Missouri**

The court further instructs the jury as to the first count of the petition relating to alleged personal injuries, if you believe from the evidence that as said automobile approached and reached said wagon, at the time and place referred to in the evidence, plaintiff was in a position of imminent danger and peril from the approach and movements of said automobile, and that C. saw, or by using the highest degree of care, could have seen and observed plaintiff in said position of danger, if any, in time thereafter by the use of the means at hand and with safety to said automobile and its driver and by the use of the highest degree of care to have steered said automobile to the right or north and changed the course thereof and thereby have prevented it striking said wagon, if it did, and that C. failed to use the highest degree of care so to do, and was thereby guilty of negligence, if you so find, and that as a direct result thereof said automobile collided with said wagon and plaintiff was thereby injured, if you so find, then your verdict must be for plaintiff and against defendants under this instruction as to said first count of the petition, and this would be true even though you should also believe that plaintiff did not use ordinary

<sup>5</sup> Morrison v Clark, 196 Ala 670, 72 S 305

<sup>6</sup> Strever v Woodward, 178 Ia 30, 158 NW 504.

<sup>7</sup> Brown v Callicotte (MoSupCt),

73 SW2d 190 See also Baitner v Darst (MoSupCt), 285 SW 449, Meyer v Pevely Dairy Co, 333 Mo 1109, 64 SW2d 696



care for his own safety and was negligent in getting into said position of peril, if any, at said time and place.<sup>7</sup>

#### South Dakota.

If you find that defendant was negligent and that his negligence contributed to and helped to cause the collision and damages and that the plaintiff at the time of said collision was driving his vehicle on the left side of the center of the highway, or that the plaintiff failed to operate his said horse and buggy in a careful and prudent manner or that, under the foregoing definition, he was at said time and place guilty of negligence in what he did and his manner of operating or driving the said horse and buggy, and that his said negligent acts or omissions in any way contributed to or helped to cause the injury, in such case plaintiff can not recover.<sup>8</sup>

#### Washington

Any negligence on the part of J. W. in equipping said spring wagon or in driving and operating the same, or any negligence of his said wife, whom he left in charge while said spring wagon was parked at the time of the accident, if any such appears, can not be imputed to M R W, and the plaintiff is not deprived of his right of action in this case by reason of any negligence, if you find there was any, on the part of the driver of said spring wagon, while the same was parked, and in which wagon the said M. R. W. was riding, if you find that she, said M. R. W., exercised ordinary care and prudence.<sup>9</sup>

#### Wisconsin

The fact that the near wheel of the plaintiff's wagon was to the left of the middle of the road, if you find that it was on such side, would not necessarily constitute a want of ordinary care on his part, contributing to the injury.<sup>10</sup>

### § 480. Successive collisions and collision of several vehicles.

#### Alabama.

I charge you that if you are reasonably satisfied from the evidence that the defendant, L., was guilty of negligence by being on the left side of the road, instead of being on the right side of the road, and thereby, by reason of that negligence, struck the car of Mr. F. and caused Mr. F.'s car to strike the car of Mr. G., he would be as responsible for the damages as if his own car had struck the car of Mr. G.; if he thereby set

<sup>8</sup> Morton v Holscher, 60 SD 50, 243 NW 89

<sup>9</sup> Danielson v Carstens Packing Co., 121 Wash 645, 210 P 12

<sup>10</sup> Anderson v Sparks, 142 Wis 398, 125 NW 925 See also Zeidler v Goelzer, 182 Wis 57, 195 NW 849

in motion the car of Mr. F., and Mr. F. himself was not guilty of negligence—Mr. F. would not be liable and Mr. L. would be liable.

I charge you further, if you are reasonably satisfied from the evidence that Mr. L. was not operating his car with proper caution, and he caused Mr. F.'s car to start across the road and damaged Mr. G.'s car, and after Mr. F.'s car was hit by Mr. L.'s car, Mr. F. did something that a reasonably prudent person would not have done under the circumstances, or did not do something that he should have done, then that would constitute concurrent negligence on the part of both, and your verdict should be against both defendants.<sup>11</sup>

#### Connecticut.

But now, let us suppose that Mr. B. was negligent, as alleged by the defendant, that the thing took place just as the defendant claims it did, that Mr. P.'s front wheels passed Mr. B.'s front wheels, that Mr. B. turned his car to the right and skidded his rear into Mr. P.'s left front, throwing Mr. P.'s car out of control, but who within a few feet stopped his car, and was then crashed into by Mr. R.

Well, now, to put the matter the other way, by another illustration. Let us look at it from the plaintiff's claim. Let us suppose that the collision between the B. and P. cars did not occur within, say 50 feet of the place where the ultimate collision took place, as claimed by Mr. P., but took place 150 or 200 feet further south on the road, near the bridge, and that Mr. P. would have had ample time, in that space, if he had been going at the rate of speed he said he was, to have stopped his car but that instead of that he drove on and negligently ran into the standing car of the plaintiff. We have there a case where, as it seems to me, and as I charged you, the negligence of the defendant, Mr. P., was the proximate cause, and the direct cause and immediate cause, of this injury.<sup>12</sup>

#### Maryland

The court instructs the jury that, even if they believe from the evidence that the truck of the defendant was hit by the truck in which the plaintiff was riding prior to the accident in which the plaintiff was injured, this circumstance afforded no justification or excuse for the driver of the defendants' truck to operate it in a negligent manner, and, if they believed from the evidence that at the time of the accident in which the plaintiff was injured, the truck of the defendants was

<sup>11</sup> Lang v Gunn, 23 AlaApp 574,  
129 S 318.

<sup>12</sup> Rolston v Pratt, 101 Conn 490,  
126 A 841.

operated negligently, and as a result of said negligence and without any negligence on the part of the operator of the other truck, the plaintiff was injured, the verdict should be in his favor <sup>13</sup>

**§ 481. Liability of private owner or operator of motor vehicle for injuries to passenger. <sup>14</sup>**

**California**

(1) "Wilful misconduct" would imply a purposeful disregard of the care and diligence which the said defendant owed said plaintiff <sup>15</sup>

(2) Wilful misconduct would be an act done by the host with intent to cause the disaster involved in the suit with consequential damages to the guest, or the failure by the host to prevent the disaster, intending such omission to permit the occurrence, with such injuries as would probably result therefrom to the guest. <sup>16</sup>

**Idaho.**

(1) You are instructed that as it is conceded the deceased, P. W., was riding in the automobile of the defendant as a gratuitous passenger, then the defendant is liable if the accident resulting in the death of P. W. shall have been caused by the intentional act on the part of the operator or by the intoxication of the operator or his reckless disregard of the rights of others; and if you find from a preponderance of the evidence that any one of these things was the proximate cause of the death of P. W., then your verdict should be for the plaintiff, if you find for the plaintiff upon the other issues. <sup>17</sup>

(2) The court instructs the jury that a joint enterprise is an undertaking for the mutual benefit or pleasure of the parties. Should the jury believe from the evidence in this case that the deceased, J. H. M., and defendant, K., were engaged in a joint enterprise, that is an undertaking for their mutual benefit at the time they were traveling together on the road when the collision occurred, then the defendant owed the duty to the deceased, J. H. M., to exercise ordinary care in the operation of the automobile and if the defendant failed to

<sup>13</sup> Christy v Hammond, 161 Md 139, 155 A 322

<sup>14</sup> See also § 393, *supra*

<sup>15</sup> Nelson v Westergaard, 130 Cal App 79, 19 P2d 867

See also California Vehicle Code, § 17158.

<sup>16</sup> Walker v Bacon, 132 CalApp 625, 23 P2d 520

<sup>17</sup> Willi v Schaefer Hitchcock Co, 53 Idaho 367, 25 P2d 167.

The instruction has been changed to conform to the latest amendment, § 49-1401, Idaho Code Ann.

exercise ordinary care in the operation of the automobile at the time and place in question, and that his failure in that respect was the proximate cause of the death of J. H. M., then your verdict should be for the plaintiffs in this case <sup>18</sup>

#### Indiana

One of the material allegations in plaintiff's complaint is that at the time of the accident in question, the plaintiff was riding with the defendant as the invited guest of said defendant. The court instructs you, if you find from the evidence that plaintiff was riding at his own request and merely by sufferance of or without objection by defendant, and not as the invited guest of said defendant, and without any contract between plaintiff and defendant whereby plaintiff was to compensate defendant, then in that case the defendant would owe no duty to plaintiff except not to injure him wantonly or wilfully, and, if the facts be as indicated in this instruction, then your verdict should be for the defendant, unless you find from the evidence that defendant wantonly or wilfully brought about the injuries complained of <sup>19</sup>

#### Nebraska.

It is not claimed that the defendant was intoxicated; the only ground of recovery alleged by plaintiff is that she suffered the injuries of which she complains because of gross negligence of the operator of the car in operating same at the time of the accident. With reference to this term "gross negligence" in the statute [Neb. R. S., § 39-740], you are instructed that it was the evident intention of the legislature to exempt the driver of an automobile from liability for injuries suffered by the guest because of ordinary negligence of the driver, and permit his recovery only when such injuries were the result of gross negligence or intoxication. It is therefore necessary to distinguish between ordinary negligence and gross negligence in the determination of this case. "Ordinary negligence" is the doing of some act that under the circumstances of the accident an ordinarily prudent person would not have done, or the failure to do some act or take some precaution which a person of ordinary prudence would have done or taken. "Gross negligence" is a wanton or reckless disregard of the safety of others, it signifies the driving of an automobile carelessly or heedlessly in a reckless disregard of the rights of others or of the consequences, but need not necessarily be wilful. For mere

<sup>18</sup> McCov v. Kiengel, 52 Idaho 626, 17 P2d 547

<sup>19</sup> Munson v. Rupker, 96 IndApp 151, 148 NE 169, 151 NE 101

The instruction has been changed to conform to the latest amendment, Burns' Ind. Stat., § 47-1021

negligence not amounting to gross negligence defendant would not be liable, for "gross negligence" he would be liable to plaintiff <sup>20</sup>

#### Oklahoma

If, at the time of the death of decedent, the defendant, either by custom or consent, had undertaken to and was transporting the decedent from his place of work as an employee of defendant to his home in a car owned by defendant and driven by another employee of defendant, then it was the duty of the defendant to use ordinary care to furnish the decedent with reasonably safe transportation from his place of work to his home. Such duty on the part of the defendant was a non-delegable duty, and the negligence of the driver, if any, was the negligence of the defendant.

When a master, either by custom or by consent, undertakes the duty of furnishing an employee with transportation between the employee's place of work and his home, it is the duty of the master to use ordinary care to furnish said employee with reasonably safe transportation and to use ordinary care to protect him from injury during said transportation, and a failure to use such ordinary care on the part of the defendant would be negligence and would render the defendant liable to the plaintiff if such negligence directly and proximately caused or contributed to the death of decedent, unless the decedent was guilty of contributory negligence <sup>21</sup>

#### Virginia

(1) Before an invited guest can hold his host liable, it must be shown that the host was guilty of gross negligence in the operation of the automobile [Va. Code, § 8-646 1]. <sup>22</sup>

(2) The court instructs the jury that the defendant owed deceased, S L K, the duty not to either knowingly or wantonly add to the perils to be ordinarily expected upon such a trip, and that if the defendant either knowingly or wantonly did add to such perils, and as the proximate result, deceased was killed, then you should find for the plaintiff. <sup>23</sup>

(3) The court instructs the jury that the driver of the D. truck had no authority, express or implied, to permit plaintiff to ride upon the truck, and therefore unless you believe from the preponderance of the evidence that the plaintiff's injuries

<sup>20</sup> Swengil v Martin, 125 Neb 745, 252 NW 207

<sup>21</sup> Cushing Ref & Gasoline Co v Deshan, 149 Okl 225, 300 P 312

<sup>22</sup> Young v Dyer, 161 Va 434, 170 SE 737

<sup>23</sup> Poole v Kelley, 162 Va 279, 173 SE 537

were wantonly inflicted by the driver of D.'s truck, you must find for the defendant, D.'s personal representative

The court instructs the jury that though you may believe from the evidence that the driver of the D truck was guilty of negligence or even of gross negligence, yet you shall find for the defendant, D.'s representative, unless you further believe from the evidence that the plaintiff's injuries were wantonly inflicted as defined in these instructions.

A servant who is driving an ordinary passenger automobile or freight truck for his master has no ostensible authority by virtue of such employment to suffer, permit, or invite another person to ride therein for a purpose which has no connection with his master's business. One so riding in such an automobile by the sufferance, permission, or invitation of the servant driver, given either in violation of his master's instructions or without express or implied authority from the master to grant such permission, stands as to the master in the shoes of a trespasser. He can not recover from the master for his negligence in permitting the automobile to be operated with defective brakes or other equipment, or for the negligence of his servant in the operation of the automobile, even though the negligence be gross, if it falls short of being such conduct as amounts to the wilful or wanton, injuring of the rider.<sup>24</sup>

**§ 482. —Contributory and imputed negligence of injured person.<sup>25</sup>**

California.

(1) The duty of a passenger to remonstrate against excessive speed or to withdraw from the vehicle, a reasonable opportunity therefor being afforded, is not absolute; the question, whether by failing to do so he is wanting in ordinary care, being dependent upon the circumstances of the particular case.<sup>26</sup>

(2) If you find from a preponderance of the evidence that the defendant P was actually operating the automobile at the time and place of the accident, and that he was negligently operating it, and, if you further find that prior to the accident

<sup>24</sup> *Morris v Dame's Exr*, 161 Va 545, 171 SE 662

<sup>25</sup> General instructions on negligence or fault of injured person when defendant is charged with gross negligence or wilful, wanton, or reckless acts or conduct, see § 394

Instructions on contributory and

imputed negligence of occupant other than operator in actions other than against owner or operator of vehicle in which injured person was riding, see §§ 396-412

<sup>26</sup> *Queirolo v Pacific Gas & Elec Co*, 114 CalApp 610, 300 P 487, see 295 P 882

P. became incompetent to safely operate the automobile by reason of an overindulgence in intoxicating liquor, and that he drank such liquor in the presence of H. A., and the latter knew that he was in such a condition, then it was negligence on the part of H. A. to continue to ride with said P., providing H. A. had a reasonable opportunity to alight from the automobile <sup>27</sup>

(3) I further instruct you that a passenger in an automobile operated by another not for hire is required to use ordinary care for his own safety. If he is aware that the operator is carelessly operating the automobile, or is carelessly rushing into danger, it is incumbent upon him to take such steps as an ordinarily prudent person would take under the same circumstances for his own safety.

I therefore instruct you that if you find from the evidence that said D. M. C., while a passenger in the automobile in which he met his death, by the exercise of ordinary care could have avoided the injuries which he received, then your verdict should be for the defendants <sup>28</sup>

#### Colorado

To establish a joint enterprise such as would justify imputing to an occupant of an automobile the negligence of the driver, it must appear that the occupant did in fact exercise control over the driver, or that the circumstances were such as to justify the inference that the occupant had the right to exercise such control over the driver, or that the occupant and the driver jointly were controlling the operation of the automobile or had a right jointly to control its operation <sup>29</sup>

#### Connecticut

(1) A passenger in a car riding in a populous city with one leg protruding from one of the doors of a car in such a way as to make it liable to come in contact with passing objects is negligent in conduct <sup>30</sup>

(2) Contributory negligence is not a defense to a cause of action for wanton misconduct. Should you find that the plaintiff has established his cause of action based upon wanton misconduct of the defendant, then you need not consider at all, any claims of contributory negligence on the part of the plaintiff. <sup>31</sup>

(3) To ride on the running board of a moving automobile is necessarily attended with greater danger than to ride inside the

<sup>27</sup> Anderson v Pickens, 118 Cal App 212, 4 P2d 794

<sup>28</sup> Curran v Earle C. Anthony, Inc., 77 CalApp 462, 247 P 236

<sup>29</sup> Parker v Ullom, 84 Colo 433,

271 P 187

<sup>30</sup> Salemme v Mulloy, 99 Conn 474, 121 A 870

<sup>31</sup> Grant v MacLelland, 109 Conn 517, 147 A 138

body of the car, and when one chooses to do so, he must exercise a greater degree of care and diligence than when riding inside the car as the greater the danger, the greater the care that must be exercised.<sup>32</sup>

(4) It could hardly be expected that one would leap from a fast-moving car under those circumstances, unless perhaps jumping was less dangerous than remaining in the car. The test is what an ordinarily reasonable and prudent person would have done under the circumstances and conditions then and there existing.

Also, if the driver of a car, from intoxication, is in a condition which renders him incapable of operating it with proper diligence and skill, and this is known or palpably apparent to one entering the car, that is a fact to be taken into consideration along with the other facts in the case in determining whether such person exercised ordinary or reasonable care in entering or remaining therein. If an ordinarily reasonable and prudent person would not have entered an automobile driven by a person known to be intoxicated, or whose intoxicated condition is palpably apparent, it would be negligent for one to so enter the automobile and ride therein, and, if injury resulted from the failure of the driver to operate the car with proper care and skill because of his intoxicated condition, then the person riding therein could not recover under those conditions. A guest or a gratuitous passenger, however, is not negligent in riding with an intoxicated driver or one under the influence of intoxicating liquors, if he was unaware of such intoxication, and no facts had been noticed by him which would arouse the suspicions of one of ordinary prudence in relation thereto. Also, if you find that the defendant was intoxicated or under the influence of liquor, you will determine whether that fact was known to the plaintiffs or any one of them, or that his intoxicated condition was so palpably apparent that it must have been known to them and liable to affect his operation of the car. You will then determine whether they or any of them was negligent in entering the car, or acted as a reasonably prudent person while in the car, without doing more than you may find they or any one of them did to have the defendant run the car in a more reasonable or proper manner.<sup>33</sup>

Idaho.

(1) You are instructed that a gratuitous guest may not recover for his host's negligent operation of an automobile, if,

<sup>32</sup> *Salemme v Mulloy*, 99 Conn 474, 121 A 870.

<sup>33</sup> *Fitzpatrick v Cinitis*, 107 Conn 91, 139 A 639.



conscious of apparent danger or faced with such conditions and circumstances as would herald danger to a reasonably prudent man, he fails opportunely to protest or acquiesces therein

And if you find from the evidence in this case that the plaintiff knew, or as a reasonably prudent man should have known, the defendant W M B. was driving and operating his automobile in a dangerous manner, and you further find said plaintiff after a seasonable opportunity so to do, failed to opportunely protest against such dangerous driving and operation of said automobile, then and in that event plaintiff can not recover.<sup>34</sup>

(2) The court instructs the jury that an automobile passenger may be negligent in continuing to ride with a driver who is manifestly incompetent or inattentive to his or her duty; and should the jury in this case believe from the evidence that the defendant, D. T., was intoxicated at the time of the accident, and that on account of being intoxicated the said D T. was negligent in the operation of the automobile, and should you further believe from the evidence that the plaintiff, S. K. F., continued to ride in said automobile with the said defendant knowing the said defendant, D. T, was then and there intoxicated, and should the jury further believe that a reasonably prudent person would not have continued to ride with the said D. T. under the circumstances, then, and in that case, you are justified in concluding that the plaintiff, S K. F, was guilty of negligence; and should you further believe that such negligence, if any you find, contributed to the proximate cause of the injury of the said S K. F, then she may not recover from the defendant in this action

Should the jury believe from the evidence that the plaintiff, S. K F, purchased intoxicating liquor on the trip in question and that it was for that reason that the defendant D T. became intoxicated, if in fact you find that she was intoxicated, and should the jury further believe that the accident occurred on account of the intoxication of the said D T, if in fact you find that she was then intoxicated, then, and in that case, the plaintiff would be guilty of negligence in supplying intoxicating liquor to the defendant D T, and if that fact contributed to the proximate cause of the injury to the plaintiff, S. K. F, then she may not recover in this case.<sup>35</sup>

#### Indiana.

(1) In order to establish a joint enterprise between a pas-

<sup>34</sup> Dillon v Brooks, 51 Idaho 510,  
6 P2d 851

<sup>35</sup> French v Tebben, 53 Idaho 701,  
27 P2d 474

senger or guest in an automobile and the driver, such passenger or guest must have either expressed or implied rights to direct the movements of the vehicle.<sup>36</sup>

(2) If you find that the journey on which plaintiff and the defendant A were riding at the time and place of the accident was undertaken for the convenience or benefit of the plaintiff, and that he was not a passenger for hire at the time, I instruct you that if the defendant A was, at, or immediately prior to, the time of the collision complained of, driving at a reckless and dangerous rate of speed, and that plaintiff knew, or in the exercise of ordinary care for his own safety could have known, of such dangerous and reckless driving in time to have avoided the accident in question, and that if the plaintiff took no such steps thus open to him, if any were, then the alleged reckless and careless driving of the defendant A. became the same as his own. If a person of ordinary prudence, situated as plaintiff was, could, by the exercise of ordinary care, have avoided the alleged recklessness and carelessness of the said defendant A, the plaintiff cannot recover in this action as against said defendant A.<sup>37</sup>

#### Kansas

An invited guest, riding in an automobile driven at an excessive and dangerous speed, is required to exercise such care as is reasonable and practical to avoid injury to himself, and if he fails to warn the driver, remonstrate with him, or demand that the automobile be stopped so that he may leave it or take any precaution for his own protection, when there is time and opportunity to do so, no recovery can be had for injury sustained by him through the negligent operation of the car.

You are instructed that if you find from the evidence that R. S. was a young man 20 years old, in the possession of all his faculties, and that at the time of the accident complained of he was riding in an automobile driven by the defendant at a dangerously high rate of speed, and that he had been riding in said automobile for a sufficient distance prior to the accident for him to become aware that said automobile was being driven at a high and dangerous rate of speed, and if you further find that R. S. made no protest to the defendant against the high rate of speed of the automobile, and did not request the defendant to stop or slow down the car, then I instruct you that R. S.

<sup>36</sup> Friedman v Wolf, Superior Court, Lake County, Indiana, No 22640

<sup>37</sup> Setzer v Alger, Superior Court, Lake County, Indiana, No. 1254

was guilty of contributory negligence, and the plaintiffs can not recover in this action.<sup>38</sup>

#### Minnesota.

If plaintiff occupied this automobile after attending a pleasure party, and she was aware of the fact that the driver was drinking intoxicants at this party, and if she knew or had reason to know that S was under the influence of liquor to such an extent as to render S incapable of safely and prudently driving the automobile, the plaintiff in such circumstances is guilty of contributory negligence as a matter of law, and plaintiff can not recover if she is injured as a result of the driver's negligence.<sup>39</sup>

#### Missouri

Even though you find from the evidence that the driver of the truck was negligent, yet, if you further find from the greater weight of the credible testimony that plaintiffs' daughter was also negligent, as defined in other instructions, and that that negligence directly contributed to her death, the plaintiffs can not recover.

Plaintiffs' daughter could not rely absolutely upon the driver to drive the automobile safely. It was her duty to use ordinary care to observe the road and the manner of driving. If you find from the evidence that she permitted herself to be driven at a rapid rate of speed, up to and around the curve in the road, when in the exercise of ordinary care, she should have observed said curve and warned the driver of the car, and such failure, if any, directly contributed to cause her injuries, then plaintiffs can not recover.<sup>40</sup>

#### Montana.

The primary duty of caring for the safety of the vehicle and those riding in it rests upon the driver. A mere gratuitous passenger is not guilty of contributory negligence, as a matter of law, until he in some way actively participates in the negligence of the driver, or is aware of the incompetence or carelessness of the driver, or knowing that the driver is not taking proper precautions while approaching a place of danger, fails to warn or admonish the driver.

If W was violating the ordinance, he was guilty of negligence per se, if he was not keeping a proper lookout ahead, he was negligent, but the negligence of the driver of an automobile is not generally imputed to the passenger, although this

<sup>38</sup> Sharp v Sproat, 111 Kan 735, 221 NW 232  
208 P 613, 26 ALR 1421

<sup>40</sup> Carlton v Stanek, 225 MoApp

<sup>39</sup> Rau v Smuda, 175 Minn 328, 646, 38 SW2d 505

does not absolve the passenger from taking such precautions for his own safety as are, under the particular circumstances, reasonable. That the passenger is not looking ahead does not necessarily show him guilty of contributory negligence.<sup>41</sup>

#### New York

Even though you find this trip was made solely at the request of the plaintiff, he still is entitled to recover for the negligence of the operator of this car, if there was negligence.<sup>42</sup>

#### North Carolina

I further instruct you that the law recognizes that contributory negligence may be due either to acts of omission or acts of commission, in other words, lack of diligence or want of due care on the part of the plaintiff may consist of doing the wrong thing at the time and place in question, or may consist of doing nothing when something should be done. The test is: Did the plaintiff exercise that degree of care which the ordinarily prudent man would exercise under similar circumstances, and was his failure to do so the proximate cause of his injury? Defendant P contends that K's failure to exercise proper care was the cause of K's injury; that it was an act of omission on K's part, that K failed to do something that he should have done; that by his own testimony K told the jury Mr P was operating the car recklessly, at a high and excessive rate of speed, and that K failed to have him stop the car and get out, and that by this act of omission, K was negligent and that you should so find. Plaintiff K contends that he remonstrated as best he could and that he was not the owner of the car and that he did the best he could. If the defendant P has satisfied you by the greater weight of the evidence that K was negligent, and that his negligence was the proximate cause of the injury, it would be your duty to answer the second issue "Yes," but if you do not so find, and if weighing and considering all the evidence you find it equally balanced, you will answer it "No."<sup>43</sup>

#### Ohio

It was the duty of the plaintiff to exercise reasonable care for his own safety. The defendant alleges that the plaintiff acquiesced in what the defendant did at the time, that is that he remained passive and did nothing to avoid whatever danger there was impending from the conduct of the defendant and the surrounding circumstances. Now it is for you to determine

<sup>41</sup> *Marinkovich v Tierney*, 93 Mont 72, 17 P2d 93

293, 231 NYS 657

<sup>43</sup> *King v Pope*, 202 NC 554, 163

<sup>42</sup> *Amann v Thurston*, 133 Misc SE 447

whether the conduct of the plaintiff in that respect was or was not the exercise of reasonable care for his own safety.<sup>44</sup>

#### Pennsylvania

Also bear in mind that the law does not look with favor on back seat drivers. If you are riding in an automobile and you undertake to help the driver to operate that automobile, nine times out of ten you will do more harm than good, you know that, and you know if you are going to say, "Did you see that light? Look out for that car," you are going to make him nervous. There is no duty on your part to do that. But it might be that you would think that he saw these cars coming together at such a distance that it was his duty to do something about it. If you do so think and he did not do something, then he was guilty of contributory negligence and he can not recover.<sup>45</sup>

#### Washington

(1) The driver's coadventurers must exercise ordinary care and can not trust themselves entirely to the care of the driver, placing absolute reliance upon his caution.

The members of a joint enterprise owe to each other the duty of exercising ordinary care, that is to say, where the joint adventure relationship exists, the driver of the automobile is required to exercise ordinary care, and his coadventurers riding with him are also required to exercise ordinary care.

If the automobile was driven at a speed dangerous under all circumstances, or dangerous under the particular circumstances, and the passenger had an opportunity to warn or protest against the speed and failed so to do, he can not recover against the owner for an injury resulting from the excessive speed. His conduct, under the circumstances, must have been that of a reasonably prudent person. It is not reasonable prudence for one to remain passive while another negligently subjects him to an unnecessary danger when an opportunity to act is present.

If you find the accident in this case was the natural and proximate result of the defendant's excessive speed and reckless driving, and that such manner of driving had existed and continued prior to the time and place of the accident for a sufficient length of time to afford opportunity of protest or of leaving the car, and that plaintiffs observed defendant's manner of driving or in the exercise of ordinary care for their own safety should have so observed, and you find that under the same or

<sup>44</sup> Hughes v Hanselman, 44 Oh Co., Inc, 116 PaSuperCt 421, 176 App 516, 38 OLR 84, 185 NE 852. A 812. See also Peterson v Mc-

<sup>45</sup> Winters v York Motor Exp Causlan, 314 Pa 176, 170 A 276.

similar circumstances, a reasonably prudent and cautious man in the exercise of ordinary care would have made some effort to secure the proper operation of the car, or given opportunity, left it, and you further find that plaintiffs made no protest as to the method of operation of the car or given opportunity did not leave it, then I instruct you that plaintiffs were guilty of contributory negligence which would bar any recovery in this case <sup>46</sup>

(2) You are instructed that should you find that defendant G G, some time before the collision in question, to the knowledge of plaintiff W, had been drinking intoxicating liquor, or should you find that at the time of the collision he was driving under the influence of liquor, this would not necessarily prevent Mr W. from recovering

There are times when an automobile passenger may be negligent in continuing to ride with a driver who is manifestly incompetent or inattentive to duty, and there are times and circumstances also when it is not negligence to do so

The question whether the driver G G was grossly negligent in driving his car, and also the question whether the passenger W was guilty of independent negligence, in riding or continuing to ride with him, are both questions which under all of the facts of the case are for the jury to determine

The ultimate test you should apply in determining whether the plaintiff, W., was guilty of independent negligence in riding with the defendant, G G, is whether in so doing he acted as an ordinarily careful and prudent person would have acted under the circumstances. Matters for you to consider are: Whether the driver evidenced recklessness in his driving from use of intoxicants or otherwise or at all; if so, whether this was apparent or should have been apparent to the passenger, whether the facts required that the passenger protest, whether he did protest and if so, adequately, whether the passenger should have continued riding, whether he could have or should have got out. These are all matters which you may consider, along with the other facts of the case, in determining whether the passenger exercised ordinary care in entering the car or remaining in it, or in reference to his conduct while in it. If, under all of the facts, you find that the passenger failed to exercise that care which an ordinarily careful and prudent person would have exercised under the circumstances, and such failure caused or contributed in causing an injury to himself, he can

<sup>46</sup> *Alexiou v Nockas*, 171 Wash 369, 17 P2d 911

not recover therefor; but if you find that he did act as an ordinarily careful and prudent person similarly situated would have acted, then there is nothing in his own conduct which would bar his recovery.<sup>47</sup>

#### Wisconsin

The third question is this.

If you answer the first question "Yes," then answer this: Did the plaintiff know, or ought she to have known, before accepting the invitation of the defendant to take a ride, that he was an unskilled automobile operator?

Notice that you are not to answer this question at all unless you first find that it was lack of skill which produced this accident.

In answering this question, you are to take into consideration everything which the evidence establishes tending to show what knowledge the plaintiff had, before this ride in question, about the experience and skill of the plaintiff in operating his automobile, and you are here to decide whether she actually knew, or had such information that she ought to have become aware, that the defendant was an unskilled automobile operator.<sup>48</sup>

#### § 483. Persons liable for negligence of operator.

#### § 484. — City, county, or state.<sup>49</sup>

The court instructs the jury that under the laws of the state of Missouri, all motor vehicles not in motion upon the highways

<sup>47</sup> Wold v Gardner, 167 Wash 191, 8 P2d 975

<sup>48</sup> Thomas v Steppert, Circuit Court, Marathon County, Wisconsin, see 200 Wis 388, 228 NW 513

<sup>49</sup> Instructions and annotations on liability from operation of police vehicles, see § 474

Instructions and annotations on liability from operation of vehicles used for fighting fire or rescuing property from fire, see § 475

Instructions and annotations on liability from operation of ambulances, see § 476

Liability of city is involved in the following cases

Alabama Densmore v Birmingham, 223 Ala 210, 135 S 320

California. Bertiz v Los Angeles,

74 CalApp 792, 241 P 921, Coleman v Oakland, 110 CalApp 715, 295 P 59, Harding v Hawthorne, 114 CalApp 580, 300 P 42, Armas v Oakland, 135 CalApp 411, 27 P2d 666, 28 P2d 422, Tuten v Emeryville, 139 CalApp 745, 35 P2d 195, Willoughby v Zylstra, 5 CalApp2d 297, 42 P2d 685, Lossman v Stockton, 6 CalApp2d 324, 44 P2d 397

Colorado Moses v Denver, 89 Colo 609, 5 P2d 581, Johnsen v Baugher, 92 Colo 588, 22 P2d 855, LeMarr v Colorado Springs, 95 Colo 244, 35 P2d 497

Connecticut Tierney v Correia, 120 Conn 140, 180 A 282

Florida. Maxwell v Miami, 87 Fla 107, 100 S 147, 33 ALR 682, Tallahassee v. Kaufman, 87 Fla 119,

100 S 150, West Palm Beach v Grimmer, 102 Fla 680, 136 S 320, 137 S 385, Wolfe v Miami, 103 Fla 774 131 S 539 137 S 892

Illinois Johnston v Chicago, 258 Ill 494, 101 NE 960, 45 LRA (NS) 1167, AnnCas 1914B, 339, affg 174 IllApp 414, Gebhardt v LeGiangre Paik, 354 Ill 234, 188 NE 372, 1evg 268 IllApp 556

Indiana Indianapolis v Lee, 76 IndApp 506, 132 NE 605, Smith v Gary, 93 IndApp 675, 178 NE 572

Iowa Jones v Sioux City, 185 Ia 1178, 170 NW 445, 10 ALR 474, Bradley v Oskaloosa, 193 Ia 1072, 188 NW 896, Leckliter v Des Moines, 211 Ia 251, 233 NW 58

Kansas Rose v Gypsum City, 104 Kan 412, 179 P 348, Johnson v Iola, 109 Kan 670, 202 P 84, McGmley v Cheriyaale, 141 Kan 155, 40 P2d 377

Louisiana Ronaldson & Puckett Co v Baton Rouge, 3 LaApp 509, Manguno v New Orleans (LaApp), 155 S 41, Wise v Eubanks (La App), 159 S 161

Massachusetts Ducey v Webster, 237 Mass 497, 130 NE 53

Michigan Wrighton v Highland Park, 236 Mich 279, 210 NW 250

Missouri Richardson v Hannibal, 330 Mo 398, 50 SW2d 648, 84 ALR 508

Montana Griffith v Butte, 72 Mont 552, 234 P 829

Nebraska. Opocensky v South Omaha, 101 Neb 336, 163 NW 325, LRA 1917E, 1170

New Jersey Florio v Jersey City, 101 NJL 535, 129 A 470, 40 ALR 1353, Baron v Bayonne, 7 NJ Misc 565, 146 A 665

New York Cohen v New York, 215 AppDiv 382, 213 NYS 710, Downing v New York, 219 AppDiv 444, 220 NYS 76, affd in 245 NY 597, 157 NE 873, Aspinall v New York, 221 AppDiv 753, 223 NYS 501, Nichitta v New York, 223 AppDiv 428, 228 NYS 528, Fox v Syracuse, 231 AppDiv 273, 247 NYS 429, Miller v New York, 235 App Div 259, 257 NYS 33, Rosenthal v Hastings-on-Hudson, 241 AppDiv

890, 272 NYS 1, Jones v Clarkson, 130 Misc 57 223 NYS 611, Kelly v Niagara Falls, 131 Misc 934, 229 NYS 328, Irolla v New York, 155 Misc 908, 280 NYS 873

North Carolina James v Charlotte, 183 NC 630, 112 SE 423, Broome v Charlotte, 208 NC 729, 182 SE 325

North Dakota Hanson v Beriy, 54 ND 487, 209 NW 1002, 47 ALR 816

Ohio Fowler v Cleveland, 100 OhSt 158 126 NE 72, 9 ALR 131, Akron v Butler, 108 OhSt 122, 140 NE 324, Mingo Junction v Shelme, 130 OhSt 34, 3 OhOp 78, 196 NE 897

Oklahoma Ardmore v Hill, 146 Okl 200, 293 P 554, Oklahoma City v Haggard, 170 Okl 173, 41 P2d 109, Spaul v Pawhuska, 172 Okl 285, 43 P2d 408

Oregon Rice v Portland, 141 Or 205, 7 P2d 989, 17 P2d 562, Keeney v Salem, 150 Or 667, 47 P2d 852

Pennsylvania Devers v Scranton City, 308 Pa 13, 161 A 540, 85 ALR 692, Scribba v Philadelphia, 82 Pa SuperCt 328, Mooney v Philadelphia, 115 PaSuperCt 433, 175 A 886, Healy v Philadelphia, 117 Pa SuperCt 417, 178 A 337

Tennessee Burnett v Rudd, 165 Tenn 238, 54 SW2d 718

Texas Hooper v Childress (Tex CivApp), 34 SW2d 907, Connally v Waco (TexCivApp), 53 SW2d 313, King v San Angelo (TexCivApp), 66 SW2d 418, Austin v Schlegel (TexComApp), 257 SW 238, affg (TexCivApp), 228 SW 291

Utah Rollow v Ogden City, 66 Utah 475, 243 P 791

Washington Hewitt v Seattle, 62 Wash 377, 113 P 1084, 32 LRA (NS) 632

Wisconsin Engel v Milwaukee, 158 Wis 480, 149 NW 141, Schumacher v Milwaukee, 209 Wis 43, 243 NW 756

Wyoming White v Casper, 35 Wyo 371, 249 P 562

Liability of county is involved in the following cases

California Chilcote v San Ber-



of this state shall be placed with their right side as near to the right-hand side of the highway as is practicable, except on streets of cities where vehicles are obliged to move in one direction only, therefore, if you find and believe from the evidence that the employees of the defendant, city of Malden, if you find they were such, failed and neglected to place the truck mentioned in evidence as near to the right-hand side of Madison Street as was practicable when they left same standing in Madison Street at the noon hour, if you find they did so, and that at said time said employees were acting within the scope of their employment as employees of said city of Malden, and if you further find that Madison Street was not a street where vehicles were obliged to move in one direction only, then the court instructs you that such act of the defendant's employees was negligence on their part; and if you further find that such negligence, if any, described in the evidence, without any negligence of plaintiff directly contributing thereto, proximately caused the injury, if any, of which plaintiff complains, then and in that event your verdict will be for the plaintiff and against the defendant, city of Malden, even though you may find and believe that the defendant, C L, was negligent in driving his automobile, and that his negligence, if any, contributed directly to plaintiff's injury, if any <sup>50</sup>

nardino County, 218 Cal 444, 23 P2d 748

Hawaii. Anduha v Maui County, Hawaii, 30 Haw 44

Iowa Bateson v Marshall County, 213 Ia 718, 239 NW 803

Michigan Gunther v Board of County Road Comrs, 225 Mich 619, 196 NW 386

Pennsylvania. Balashaitis v Lackawanna County, 296 Pa 83, 145 A 691

Wisconsin. Lickert v Harp, 213 Wis 614, 252 NW 296, Crowley v Clark County, 219 Wis 76, 261 NW 221

Liability of state or state highway department is involved in the following cases

Idaho Smith v Lewiston Highway Dist, 49 Idaho 506, 289 P 996

Kansas Cashin v State Highway Comm, 136 Kan 659, 17 P2d 838

New York Sears v State, 152 Misc 32 272 NYS 694

South Carolina Robinson v State Highway Dept, 159 SC 405, 157 SE 136, Greer v State Highway Dept, 160 SC 510, 159 SE 35

Liability of District of Columbia is involved in District of Columbia v May, 63 AppDC 10, 68 F2d 755, cert den in May v District of Columbia, 292 US 630, 78 LEd 1484, 54 SupCt 641

Liability of township is involved in Washington Tp v Rapp, 50 Oh App 1, 3 OhOp 409, 197 NE 413

<sup>50</sup> Jackson v Malden (MoApp), 72 SW2d 850.

§ 485. — Hospital and charitable associations and corporations.<sup>51</sup>

Alabama

The court charges the jury that a person driving an ambulance or automobile is presumed to be the agent, servant or employee of the owner thereof and presumed to be acting within the line and scope of his employment as such agent, servant, or employee; and to overcome such presumption, the burden is upon the owner of such automobile or ambulance reasonably to satisfy you by the evidence that the contrary is true

The court charges you that a person driving a vehicle, in this case it was an ambulance, is presumed to be the agent, servant or employee of the owner thereof, and is presumed to be acting within the line and scope of his employment as said agent, servant or employee during the driving of said ambulance That is a presumption against the owner of the ambulance who lets other people drive the ambulance The presumption is that those driving it are agents of the owner, acting within the line and scope of his employment

That presumption may be overcome by evidence to the satisfaction of the jury In other words, if the jury believes from the evidence that the ambulance driven in this case belonged to the defendants, or either one of the defendants, it would be presumed that the party driving said ambulance at the time of the injury was the agent of the owner of the ambulance and that he was acting within the line and scope of his employment That would be a presumption which might be overcome by evidence in dispute, which evidence must reasonably satisfy the jury as to whether or not they were agents.<sup>52</sup>

New York.

If you find that the speed of this ambulance was the proximate cause of the accident, and also find that B, the orderly of the hospital, participated by direction or interference or suggestion in the speed, or in the cutting around at Robin Street, his act of negligence, if found to be negligent, is chargeable to the hospital

If you find in this case that this contract between A & A and the H. Hospital required A & A to furnish the driver of this car, then no matter whether B directed the driver where to go, or at what speed to go, such directions, of themselves, did not make M the servant of the H Hospital, or render his negli-

<sup>51</sup> Instructions and annotations on liability from operation of ambulances, see § 476

<sup>52</sup> Jefferson County Burial Soc v Cotton, 222 Ala 578, 133 S 256

gence imputable to the H. Hospital, and there can not be any recovery from these facts against the H Hospital.<sup>53</sup>

§ 486. — School corporations or districts.<sup>54</sup>

Even though you find from the evidence in this case that the school district was negligent in failing to equip the school bus with a mechanical or electrical device capable of displaying signals to the rear of the bus as to the intention of the driver to turn, still if you further find from the evidence that the driver of the school bus gave a timely arm signal of his intention to turn prior to the time he turned to the left, and that the plaintiff's automobile was operated to the left of the bus and from his position on the street he saw, or in the exercise of ordinary care ought to have seen, such arm signal, then under such circumstances, members of the jury, the failure of the school district to provide such mechanical device is immaterial to a determination of this case and should be disregarded by you, because under such circumstances the failure to provide such device would not be the proximate cause of the accident <sup>55</sup>

§ 487. — Owners generally.

California.

If you find from the evidence that R Q was given permission by defendant, the company just named, acting through one of its duly authorized agents, to ride to the town of Jackson and return on the company's bus, she was at the time of the accident entitled to receive at the hands of the driver, reasonable care and caution upon his part looking to the avoidance of hurt or injuries to herself. I will modify that somewhat. If you believe from the evidence that E. B was negligent, and that such negligence was the proximate cause of the injuries to the plaintiff, R. Q, and further find that he was at the time an agent of the defendant and acting within the scope of his authority as such, then your verdict must be for the plaintiff and against the defendant, P G & E. Co.<sup>56</sup>

<sup>53</sup> Baker v Allen & Arnink Auto Renting Co, 190 AppDiv 39, 179 NYS 675

<sup>54</sup> Liability of school corporations or districts is involved in the following cases.

Alabama. Turk v County Board of Education, 222 Ala 177, 131 S 436

Georgia. McLeod v Pulaski County, 50 GaApp 356, 178 SE 198

Missouri. Dick v Board of Education (MoSupCt), 238 SW 1073, 21 ALR 1327

<sup>55</sup> Farmer v School Dist No 214, 171 Wash 278, 17 P2d 899

<sup>56</sup> Queirolo v Pacific Gas & Elec Co, 114 CalApp 610, 300 P 487

**New York**

If the car was not owned by the S T O Corp and was being used without the knowledge or consent of that corporation and by persons not in its employment, the verdict must be for the defendant S T O Corp, irrespective of whether or not it was about to be used in furtherance of the business of said corporation <sup>57</sup>

**North Carolina**

The owner of an automobile is not liable in damages for injury resulting from its negligent operation merely because of his ownership <sup>58</sup>

**North Dakota**

I instruct you that the law of principal and agent, and master and servant, is not confined to business transactions. When the owner of an automobile directs or permits another to operate such car under such circumstances that the one who operates such car may be deemed to perform a service for the owner, whether such service is one of profit to the owner, or to promote for the owner the pleasure or wish of a guest of the owner, then the person operating the automobile will be the agent or servant of the owner, and the owner would be liable for the negligence of the person operating the automobile <sup>59</sup>

**Texas**

The court instructs the jury that if you find and believe from the evidence in this case that at the time of the alleged accident, that the defendant had loaned his automobile to the F Assn or to W W O for the benefit of the F Assn., and that said automobile was actually in the business of the association, and not for the business of the defendant at said time, then the plaintiff would not be entitled to recover, and your verdict should be for the defendant. <sup>60</sup>

**§ 488. — Partners or joint owners.****Indiana**

As heretofore stated, this is an action by J K, plaintiff, to recover damages against the defendants, C. D. and J S, doing business under the name and style of D & S. It is then an action against the individual defendants as a copartnership. The liability of a partner is not dependent upon the personal wrong

<sup>57</sup> Brown v Steamship Terminal Operating Corp, 267 NY 83, 195 NE 692

<sup>58</sup> Grier v Woodside, 200 NC 759, 158 SE 491

<sup>59</sup> Harmon v Haas, 61 ND 772, 241 NW 70, 80 ALR 1131

<sup>60</sup> Riley v Fisher (TexCivApp), 146 SW 581

of such partner The test of liability is based on the determination of the question whether the wrong was committed in behalf of and within the reasonable scope of the partnership business

If the jury find from a preponderance of the evidence in this case that the collision in question and the consequent injury to the plaintiff, if at all, was occasioned at a time when the partnership automobile in question was used by and in the control and possession of C D, a copartner of J S, if at all, and that said C D, at said time, was not using said automobile within the reasonable scope of any partnership business, but was using said automobile at said time, on a private mission, for pleasure or otherwise, then your verdict should be for the defendants. <sup>61</sup>

Massachusetts.

If it is found as a fact that the defendants in this action were a partnership and that the car operated on the day of the accident by F P V was owned by the partnership, but was used and operated by him for his own personal pleasure and convenience and was not used in the partnership business, then the plaintiff can not recover in this action against the partnership <sup>62</sup>

#### § 489. — Owner riding in vehicle.

Alabama.

The court charges the jury that the owner who is present in the automobile is liable for the negligence of a driver operating the machine for him <sup>63</sup>

California

You are instructed that it is admitted by the pleadings that the defendant, H, was the owner and one of the occupants of the automobile at the time of the collision. This is prima facie proof that the driver was engaged in the owner's service, and a presumption arises that the car was in use for the owner's benefit Testimony that the automobile was loaned to T. does not, as a matter of law, destroy the presumption unless it is believed by you The truth or falsity of this testimony is for you to determine The jurors are the exclusive judges of the credibility of the witnesses and the weight of the testimony Therefore, if you do not believe that the said automobile was loaned to said T., or in his possession, as claimed by the defense,

<sup>61</sup> Kansas v Dubois, Superior Court, Lake County, Indiana, No 23172 103, 145 NE 58

<sup>63</sup> Thomas v Carter, 218 Ala 55, 117 S 634

<sup>62</sup> Bunnell v Vrooman, 250 Mass

then I instruct you that, if you find that the death of R. was the result of the negligent operation of the car, your verdict must be for the plaintiffs, unless you further believe that the deceased was guilty of contributory negligence. <sup>64</sup>

**Iowa**

The defendant is held responsible for the negligent acts of his son, if any you find there were, while operating said automobile with the consent of defendant and while defendant was riding therein. <sup>65</sup>

**Maine**

If the defendant riding with her daughter retained such control of the car as gave her the right to direct how it should go, and who should drive it, and how it should be driven, then you may properly find that the defendant is responsible for the negligent acts of the daughter, G., in driving the car. <sup>66</sup>

§ 490. — Common carriers. <sup>67</sup>

§ 491. — Owner permitting operation of defective vehicle.

**Oregon.**

An automobile, which is knowingly unmanageable, is such a dangerous instrumentality that it is negligence to allow its use on the highway. <sup>68</sup>

**Texas.**

If an automobile breaks down on the road and an agent of the firm or company turns it over to the care and custody of some third party to be repaired and brought in, and, while it is being brought in for this purpose, an accident occurs, no liability would attach to the owner of the automobile for such accident, unless the defects in the machine were of such a character as to make it ungovernable and dangerous to be run on the public road, and the party turning it over for repairs and to be brought in knew that these defects made the machine dangerous to be run, or should have known of them by the use of ordinary care. In determining whether this would be negligence, the test would be: Would a person of ordinary prudence, under similar circumstances, have turned such a machine over to be brought in on its own power? If so, it would not be negli-

<sup>64</sup> *Randolph v Hunt*, 41 CalApp 739, 183 P 358

<sup>65</sup> *Smith v Spirek*, 196 Ia 1328, 195 NW 736.

<sup>66</sup> *Fuller v Metcalf*, 125 Me 77, 130 A 875

<sup>67</sup> See Chapter 48, Carriers of Passengers.

gence, but if a person of ordinary prudence under similar circumstances, would not have done this, it would be negligence.<sup>69</sup>

**§ 492. — Owner permitting incompetent operator to drive.**

**Alabama**

The court charges the jury that, if you are reasonably satisfied from the evidence that defendant entrusted his car to a person known to him to be an incompetent driver, and that such person was guilty of negligence, then the defendant would be liable to plaintiff for any damages to her as a proximate consequence of such negligence

I charge you, gentlemen of the jury, that, if you are reasonably satisfied by the evidence in this case that defendant turned the operation of his car over to a person known to him, at the time, to be an incompetent driver, and over the protest of plaintiff, and you further find that, through the negligence of defendant, or the driver, plaintiff was injured as a proximate consequence of such negligence, then the plaintiff is entitled to recover, and I charge you that it would be your duty to bring in a verdict in her favor.<sup>70</sup>

**Arizona**

The owner of an automobile, who lends it to a person known to him to be habitually reckless or inexperienced, or incompetent as a driver, may be liable for the latter's tort. The liability in such case does not rest upon ownership or agency, but upon the combined negligence of the owner and the driver, the owner's negligence consisting in the act of loaning the car to an incompetent driver, and the latter's in its operation.<sup>71</sup>

**Illinois.**

The court instructs you that it is provided by statute in the state of Illinois, that no person shall operate or drive a motor vehicle who is under 15 years of age.

And you are further instructed that if you believe from the preponderance of the evidence that the defendant E N. was the owner of a certain automobile, and that he knowingly permitted his son R N to take, drive and operate said automobile on the public highway, and if you further believe from the preponderance of the evidence, that the said R N. was then and there

<sup>68</sup> Foster v Farra, 117 Or 286, 243 P 778

<sup>69</sup> Texas Co v Veloz (TexCiv App), 162 SW 377

<sup>70</sup> Thomas v Carter, 218 Ala 55, 117 S 634

<sup>71</sup> Lutfy v Lockhart, 37 Ariz 488, 295 P 975

under age of 15 years, then as a matter of law, under such state of the proof, if such is the proof, the driving of the automobile by R. N. in violation of the statute would be negligence per se, and would make the defendant liable for any damage that was proximately caused by the driving of said automobile by said R. N. on the public highway to any other person using ordinary care and caution for his own safety.<sup>72</sup>

#### Pennsylvania

It is the duty of a man to see that his automobile is not run by a careless, reckless person, but that it is in the hands of a skilful and competent person.<sup>73</sup>

#### Virginia

If you should believe from the evidence that B. C., at the time of the accident was acting as agent of his father, the evidence of his alleged habit of occasional drinking is to be considered by you only in determining whether or not J. W. C. knew, or by the exercise of reasonable care could have known, that he was on that account not a reasonably safe and competent driver; and, unless you shall believe from the evidence that B. C. was on that account an unsafe and incompetent driver, and that J. W. C. knew or by the exercise of reasonable diligence could have known that he was, no liability can attach to J. W. C. on that ground.

The court instructs the jury that an automobile in the possession of and driven by a person under the influence of intoxicants is a dangerous instrumentality. And the law places the duty on an owner of an automobile to use due care in preventing such use of said car, when the owner knows or has reason to know that one who has been operating the same is addicted to intoxicants.

And if the jury believe that J. W. C. knew or had reasonable cause to believe that his son was addicted to intoxicants, then he owed to the plaintiff and the public at large the duty of exercising due care to prevent the use of said car by his son.

The court instructs the jury that if they believe from the evidence that the plaintiff was injured as alleged, that the said injuries were caused by the negligent or unlawful act of the said B. C., that the said B. C. was driving the automobile at the time of the accident in a reckless manner on account of being then and there under the influence of intoxicants, that he was

<sup>72</sup> Nelson v Seymour, 248 IllApp 392

The instruction has been changed to conform to subsequent amend-

ments, Smith-Hurd Ill A S., Ch 95½, § 189(b)

<sup>73</sup> Raub v Donn, 254 Pa 203, 98 A 861



in the habit of getting under the influence of intoxicants for some time prior to the accident, and that his father, J. W. C., knew or had reasonable cause to know of the habits of his son, then defendant, J. W. C., is liable for the acts of his son, while running said automobile under the influence of intoxicants, unless the jury believe from the evidence that J. W. C. took effectual means to prevent the use of his automobile by his son.<sup>74</sup>

#### Washington

If R. C. loaned the automobile with the intention or understanding that C. was to drive it, and with the knowledge that C. was likely to become under the influence of intoxicating liquors, and if, with that knowledge, he entrusted the automobile to C. under such circumstances as would produce in the mind of a reasonable man reasonable grounds for belief that the driver of the automobile might become intoxicated, then and in that event if C is liable, R. C. would also be liable.<sup>75</sup>

#### § 493. — Proof of ownership as rebuttable prima facie case of responsibility for operator's negligence.

##### Alabama

The court charges the jury that a person driving an ambulance or automobile is presumed to be the agent, servant or employee of the owner thereof and presumed to be acting within the line and scope of his employment as such agent, servant or employee and to overcome such presumption the burden is upon the owner of such automobile or ambulance reasonably to satisfy you by the evidence that the contrary is true.

The court charges you that a person driving a vehicle, in this case it was an ambulance, is presumed to be the agent, servant or employee of the owner thereof, and is presumed to be acting within the line and scope of his employment as said agent, servant or employee during the driving of said ambulance. That is a presumption against the owner of the ambulance who lets other people drive the ambulance. The presumption is those driving it are agents of the owner, acting within the line and scope of his employment.

That presumption may be overcome by evidence to the satisfaction of the jury. In other words, if the jury believes from the evidence that the ambulance driven in this case belonged to the defendants, or either one of the defendants, the party driving said ambulance at the time of the injury

<sup>74</sup> Crowell v. Duncan, 145 Va. 489,  
134 SE 576, 50 ALR 1425

<sup>75</sup> Mitchell v. Churches, 119 Wash  
547, 206 P. 6, 36 ALR 1132.

would be presumed to be the agent of the owner of the ambulance, and to be acting within the line and scope of his employment. That would be a presumption which might be overcome by evidence in dispute, which evidence must reasonably satisfy the jury as to whether or not they were agents.<sup>76</sup>

#### Arizona

Proof of ownership of an automobile causing an injury is *prima facie* evidence that the driver is the servant or agent of the owner and using it in the latter's business.<sup>77</sup>

#### California.

You are instructed that it is admitted by the pleadings that the defendant H was the owner and one of the occupants of the automobile at the time of the collision. This is *prima facie* proof that the driver was engaged in the owner's service, and a presumption arises that the car was in use for the owner's benefit. Testimony that the automobile was loaned to T does not, as a matter of law, destroy the presumption unless it is believed by you. The truth or falsity of this testimony is for you to determine. The jurors are the exclusive judges of the credibility of the witnesses and the weight of the testimony. Therefore, if you do not believe that the said automobile was loaned to said T, or in his possession, as claimed by the defense, then I instruct you that, if you find that the death of R. was the result of the negligent operation of the car, your verdict must be for the plaintiffs, unless you further believe that the deceased was guilty of contributory negligence.<sup>78</sup>

#### Idaho

The jury are instructed that the burden of proof is upon the plaintiffs to establish by a preponderance of the evidence all of the material allegations of the complaint and that this burden continues throughout the trial. In this action, the defendant admits that it was the owner of the automobile described in the complaint and that M. L. B. was driving the same, and that P. W. was riding therein as a gratuitous passenger. The burden is upon the plaintiffs to establish by a preponderance of the evidence that the automobile was at the time of the death of said P. W. being operated for and on behalf of the defendant corporation and on its business. If you find by a preponderance of the evidence that at the time of the death of P. W. that M. L. B. was the president and chief executive officer of the defendant corporation, then you

<sup>76</sup> Jefferson County Burial Soc v Cotton, 222 Ala 578, 133 S 256 295 P 975

<sup>77</sup> Lutfy v Lockhart, 37 Ariz 488, 739, 183 P 358

<sup>78</sup> Randolph v Hunt, 41 CalApp

have a right to infer that said M. L. B. was operating the said automobile for and on behalf of said corporation and in connection with its business.<sup>79</sup>

Maryland.

Under the settled law of this state, the driver of an automobile is presumed to be the employee, servant, or agent of the owner.<sup>80</sup>

Missouri

The mere showing of ownership of a car is sufficient to raise the presumption of agency. The injury occurring while someone else is driving the car makes a prima facie case of agency for the owner on the part of the driver without affirmative proof to establish the fact that the car was being operated by the driver acting within the scope of his employment. This is a pure legal presumption and does no more than shift the burden of the evidence to defendant, the owner of the car, who has peculiar knowledge of the facts and, if he comes forward with evidence unequivocally showing that the driver of the car was not acting as his servant at the time of the infliction of the injury, then the burden shifts to the plaintiff to show to the contrary.<sup>81</sup>

New York.

The license number of the car, coupled with evidence that the defendant held the license, is prima facie proof that the defendant was the owner and that the custodian of the car was then engaged in the owner's service.<sup>82</sup>

Oregon

The law is that when the plaintiff has suffered injury from negligent management of a vehicle, such as an automobile, it is sufficient prima facie evidence that the negligence was imputable to the defendant, to show that he was the owner of the car; and the defendant can then go ahead and show that the operator of the car was not his agent and the car was not in his control at the time.<sup>83</sup>

Rhode Island

Defendants have admitted the automobile was theirs, and if no other evidence was produced, this would warrant the jury in drawing the conclusion that the person in charge of the

<sup>79</sup> *Will v. Schaefer Hitchcock Co.*, 53 Idaho 367, 25 P2d 167.

<sup>80</sup> *Pennsylvania R. Co. v. Lord*, 159 Md 518, 151 A 400.

<sup>81</sup> *Benson v. Smith* (MoApp), 38

SW2d 743

<sup>82</sup> *Ferris v. Sterling*, 214 NY 249, 108 NE 406, AnnCas 1916D, 1161.

<sup>83</sup> *Foster v. Farra*, 117 Or 286, 243 P 778.

machine was engaged in the employment of defendants; but, as the defendants have testified that K was not their servant and in their employ, this issue is to be decided upon consideration of all the testimony <sup>84</sup>

**§ 494. — Master, employer, or principal generally. <sup>85</sup>**

**Alabama.**

(1) If you believe from the evidence that R W M. had control of the automobile, and the chauffeur was in his employ to operate it, this fact, if you believe it to be a fact from the evidence, was sufficient to make out a prima facie case that the chauffeur was acting within the scope of his employment at the time, and, if you believe the facts to be true from the evidence, the court charges you that the burden of proof is upon the defendant to show by the evidence to your reasonable satisfaction that the servant was not at the time operating the machine in the discharge of his master's business. <sup>86</sup>

(2) I charge you, gentlemen of the jury, that the burden of proof throughout the case is upon the plaintiff to reasonably satisfy you from the evidence that E K was negligent in the driving of the automobile at the time of the accident, and that the plaintiff was injured as a proximate result of said negligence, and that said E K occupied the relationship of agent, or servant, to the defendant before the plaintiff is entitled to recover. <sup>87</sup>

**Arkansas.**

(1) If R became the driver at the instance and request of C G, he was not the agent for R F

If R was driving the car at the instance and request of the defendant R. F., then he would be acting in the capacity as her agent in driving the car, and you should find for the plaintiffs against the defendant R F if you find that R, the driver, was negligent and such negligence proximately caused injury to plaintiffs. <sup>88</sup>

(2) If, in order to test whether the repairs had been properly made, it was necessary and usual to drive the car around, and they had been using the streets for this purpose instead of some other testing ground elsewhere, the necessity for making such test does not excuse the repairer or his master

<sup>84</sup> Burns v Brightman, 44 RI 316, 117 A 26.

<sup>85</sup> See also § 493, *supra*

<sup>86</sup> Massey v Pentecost, 206 Ala 411, 90 S 866 See also Jefferson County Burial Soc v Cotton, 222

Ala 578, 133 S 256, Kelly v Hanwick, 228 Ala 336, 153 S 269

<sup>87</sup> Kelly v Hanwick, 228 Ala 336, 153 S 269

<sup>88</sup> Gurdin v Fisher, 179 Ark 742, 18 SW2d 345

from exercising ordinary care in the use of the streets in driving the car thereon, nor from being guilty of negligence in not having ascertained the condition of the car that was left for repairs and had to be driven about the streets to determine whether said repairs were properly made <sup>89</sup>

#### California

(1) The fact that the defendant B was operating a truck belonging to his employer at the time and place in question did not render his employer liable for his negligence unless it was further established, by a preponderance of the evidence, that the operation of the truck at the very time and place of the accident was with the consent, directly or indirectly given, of his employer. <sup>90</sup>

(2) You are further instructed that the burden is upon the plaintiffs to establish by a preponderance of the evidence that T was a servant or employee of Mr. H., and acting within the scope of his employment—that is, doing the business for which he was employed—before Mr. H. can be liable. If the plaintiffs have failed to establish to your satisfaction, as reasonable men, that T was an employee of Mr. H., and acting on Mr. H's business at the time of the accident, then your verdict must be for defendant

You are instructed that it is admitted by the pleadings that the defendant, Mr. H., was the owner and one of the occupants of the automobile at the time of the collision. This is *prima facie* proof that the driver was engaged in the owner's service, and a presumption arises that the car was in use for the owner's benefit. Testimony that the automobile was loaned to T does not, as a matter of law, destroy the presumption unless it is believed by you. The truth or falsity of this testimony is for you to determine. The jurors are the exclusive judges of the credibility of the witnesses and the weight of the testimony. Therefore, if you do not believe that the said automobile was loaned to said T, or in his possession, as claimed by the defense, then I instruct you that, if you find that the death of R. was the result of the negligent operation of the car, your verdict must be for the plaintiffs, unless you further believe that the deceased was guilty of contributory negligence <sup>91</sup>

(3) The owner's liability for the acts of a chauffeur is

<sup>89</sup> Cox v Divine, 187 Ark 1162, 63 SW2d 982

<sup>90</sup> Schellenberg v Southern California Music Co, 139 CalApp 777, 35 P2d 156. See also White v Co-

vell, 66 CalApp 732, 227 P 196, Queirolo v Pacific Gas & Elec Co, 114 CalApp 610, 300 P 487

<sup>91</sup> Randolph v Hunt, 41 CalApp 739, 183 P 358

determined when a satisfactory conclusion is reached as to whether at the time in question the servant was acting within the scope of his employment, whether the acts which he was performing were expressly or impliedly authorized by his contract of employment \* \* \* Where the servant acts within the general scope of his authority, notwithstanding the fact that he may be disregarding directions of the employer at the time, the employer may be held liable <sup>92</sup>

#### Connecticut

The plaintiff must establish by a fair preponderance of the evidence that the tortious act of the defendant's employee was done in the execution of the defendant's business within the scope of his employment <sup>93</sup>

#### Delaware

If you find that the defendant was, at the time of the accident, the owner of the automobile which caused the injury, and the person running or operating it was under his direction and control, then such operator was the servant of the defendant, and any negligence in the operation of the machine would be the negligence of the defendant. And the defendant would be liable for any injury proximately caused by such negligence, provided the person injured was not guilty of some negligence on his part that contributed to the injuries.

If you find from a preponderance of the evidence in this case that the defendant, at the time of the accident, was the owner of the automobile that caused the injury to the plaintiff, and that the machine or the person operating it was under the direction and control of the defendant, and shall also believe that the injuries to the plaintiff were caused by the negligent running and operation of the machine, and the plaintiff himself was free from any negligence that contributed to the accident, your verdict should be in favor of the plaintiff. <sup>94</sup>

#### Idaho.

The jury are instructed that the burden of proof is upon the plaintiffs to establish by a preponderance of the evidence all of the material allegations of the complaint and that this burden continues throughout the trial. In this action, the defendant admits that it was the owner of the automobile described in the complaint and that M. L. B. was driving the

<sup>92</sup> *Wagnitz v Scharetg*, 89 Cal App 511, 265 P 318

<sup>93</sup> *Russo v McAviney*, 96 Conn 21, 112 A 657. See also *Matulis v Gans*, 107 Conn 562, 141 A 870,

*Whipple v Fardig*, 109 Conn 460, 146 A 847

<sup>94</sup> *Grier v Samuel*, 4 Boyce (27 Del) 106, 86 A 209

same, and that P. W. was riding therein as a gratuitous passenger. The burden is upon the plaintiffs to establish by a preponderance of the evidence that the automobile was, at the time of the death of said P. W., being operated for and on behalf of the defendant corporation and on its business. If you find by a preponderance of the evidence that M. L. B. was the president and chief executive officer of the defendant corporation at the time of the injury which resulted in the death of P. W., then you have a right to infer that said M. L. B. was then and there operating the said automobile for and on behalf of said corporation and in connection with its business <sup>95</sup>

#### Indiana

(1) A statement or an admission, if made, by a party does not of itself establish the relationship of employer and employee, at the time of the happening of the accident in question but may be considered in connection with all the other evidence and circumstances in the case bearing upon the subject of such relationship. And you will therefore determine whether such relationship existed between S. and A. Co. at such time and whether the said S. was acting within the scope of his employment from all the circumstances pertaining to such question as shown by the evidence <sup>96</sup>

(2) The plaintiff by his complaint seeks to attach liability against the defendant corporation through the acts of an agent and servant. If you find by a fair preponderance of the evidence that one H. E. was the agent and servant of the defendant corporation and was acting within the general and apparent scope of his employment and duty at the time the injuries were sustained by the plaintiff, if you find injuries were sustained by him, then I instruct you as a matter of law, that the acts of the agent and servant are the acts of the defendant corporation, the F. B. T. Co. <sup>97</sup>

#### Iowa

You are instructed as a matter of law that the acts of a servant or employee while in the usual course of his employment makes his principal liable, and in the case at bar, if you find by the preponderance or greater weight of the evidence that the servant or employee of the defendant, G. R., was negligent in the manner as herein instructed, then such negligence, if any, on the

<sup>95</sup> *Willi v Schaefer Hitchcock Co.*, 53 Idaho 367, 25 P2d 167

<sup>96</sup> *Bookatman v C R Akers Co.*, Circuit Court, Marion County, Indi-

ana, No 43782

<sup>97</sup> *Hay v Frank Bird Transfer Co.*, Circuit Court, Marion County, Indiana, No 42660

part of the servant or employee, would be the negligence of his employer.<sup>98</sup>

#### Minnesota

(1) The mere fact of the ownership of the car by the defendant is not enough to create liability on her part. A part owner of a vehicle is not liable for an injury caused by the negligent driving of a co-owner of such vehicle or car, if the car is being driven solely for the use of such co-owner and the part owner has no control thereof. The right of control is the test of the relation of master and servant. Now, if you find from the evidence that the car was being used on this trip for the joint benefit of the defendant and S. and that the defendant had the concurrent right to the control and operation of the car with S., then S. was the agent or servant of the defendant in driving the car and the defendant, in that case, would be liable for his negligence.<sup>99</sup>

(2) As I said before, one of the issues in this case is regarding the defendant V., as to whether he was in the course of his employment, and that brings up a rule that is known to the lawyers as *respondeat superior*. Literally interpreted, this means, "Let the master answer." More fully it means that a master or employer is liable in certain cases for the wrongful acts of his servant or employee. The test in determining whether the principle of *respondeat superior* applies generally is whether the person sought to be charged had, at the time, the right to control the actions of the person doing the wrong, both as to the acts done and the manner of doing them.

The evidence is undisputed that J. H. was the supervisor of meter readers and had authority with respect to the meter readers of the company, and if you should find that J. H.—and when I say J. H., I mean also any other of the power company's officials—knew or should have known that such meter readers of the company were using their personal cars in the performance of their assignments by the company and on company business and you further find that the company did not forbid them to do so on or prior to October —, 19—, then you may find the N. S. Power Company is responsible for the acts of negligence of V., that is if you find V. was negligent on October —,

<sup>98</sup> *Read v. Reppert*, 194 Ia 620, 190 NW 32.

<sup>99</sup> *Martin v. Schiska*, 183 Minn 256, 236 NW 312.



19—, and that such negligence was the proximate cause of the accident and death of I. R. <sup>1</sup>

#### Missouri

If you find from the evidence that the truck mentioned in evidence belonged to one G, and that B, the driver mentioned in evidence, was employed by G and under his general control, yet if you further find from the evidence that said G. hired said truck and driver to the defendant for the purpose of hauling said coal in said truck from its coal yards and delivering the same to such of its customers as it should thereafter designate from time to time, and that in so doing, the said driver was under the special orders of the defendant and its right of direction as to the manner or method of operating said truck, and that among such orders was one given on September —, 19—, by defendant to said driver to haul coal in said truck from its Lydia Avenue Yards in Kansas City, Missouri, for delivery to one of its customers at No. 700 East Twenty-Fifth Street in said city, then you are instructed that B.'s relationship to defendant was not that of an independent contractor responsible only for results, but that he was a servant of said defendant and that defendant is liable for any acts of negligence of said B, if he was negligent, in the managing or driving of said truck while he was on the way from said yards to said place of delivery pursuant to such orders, even though said B. was paid by said G and defendant paid the latter by the ton for such haulage <sup>2</sup>

#### New York

(1) If the car was not owned by the S T O. Corp. and was being used without the knowledge or consent of that corporation and by persons not in its employment, the verdict must be for the defendant S T O Corp irrespective of whether it was about to be used in furtherance of the business of said corporation. <sup>3</sup>

(2) In the event you find that the chauffeur was, at the time of the accident, operating the car with the consent or by the permission of the defendant, your verdict must nevertheless be for the defendant, unless it appears that at the time of the

<sup>1</sup> Rampf v Vevea, 229 Minn 11, 38 NW2d 297

In the case cited, which was an action for wrongful death, one of the defendants, Vevea, a meter reader for a power company was driving his own car, in the course of his employment, when the accident resulting in death of plaintiff's decedent occurred. Judgment for

plaintiff against Vevea and his employer was affirmed

<sup>2</sup> Renfro v Central Coal & Coke Co, 223 MoApp 1219, 19 SW2d 766 See also Hart v Weber (Mo), 53 SW2d 914, Sullivan v Thurman (MoApp), 266 SW2d 745

<sup>3</sup> Brown v Steamship Terminal Operating Corp, 266 NY 501, 195 NE 172

accident, the chauffeur was acting within the scope of his authority and engaged upon the business of the defendant. <sup>4</sup>

#### Ohio

The court charges you that if you find from the evidence that at the time of this accident, the truck driver, A. W., was acting in the prosecution of the business of the defendant, L. S. G., and that defendant, L. S. G., had the power of control or direction over the conduct of A. W., then A. W. was the agent of the defendant, L. S. G. <sup>5</sup>

#### Oklahoma.

If, at the time of the death of decedent, the defendant, either by custom or consent, had undertaken to and was transporting the decedent from his place of work as an employee of defendant to his home in a car owned by defendant and driven by another employee of defendant, then it was the duty of the defendant to use ordinary care to furnish the decedent with reasonably safe transportation from his place of work to his home. Such duty on the part of the defendant was a nondelegable duty, and the negligence of the driver, if any, was the negligence of the defendant. <sup>6</sup>

#### Rhode Island.

The fact that the defendant company owned the truck and employed the driver of the truck is not sufficient to create liability for this injury, because if there was no negligent act or negligent omission on the part of the driver, the fact of ownership can not and does not make the defendant liable for damages. <sup>7</sup>

#### Utah

In determining the question whether N. was a servant of the defendant, you are at liberty to take into consideration the actions of N. in driving the defendants' car, purchasing gas, and other supplies for the car and having the same charged to the defendants and the paying for the same by the defendants, and all the services connecting the circumstances of N. with the defendants. <sup>8</sup>

<sup>4</sup> Schreiber v Matlack, 90 Misc 667, 154 NYS 109

<sup>5</sup> Withrow v Waldman, 132 NE2d 782 (Court of Appeals of Ohio, Montgomery County)

<sup>6</sup> Cushing Ref & Gasoline Co. v.

Deshan, 149 Okl 225, 300 P 312

<sup>7</sup> Bourre v Texas Co, 49 RI 364, 142 A 621

<sup>8</sup> Ferguson v Reynolds, 52 Utah 583, 176 P 267

**Virginia**

The court instructs the jury that you can not infer negligence from the mere happening of an accident, and you can not infer agency from the fact that the automobile was owned by the defendant, and the court further instructs the jury that you can not find a verdict for the plaintiff unless and until the plaintiff has proved by a preponderance of all the evidence, that at the time of the injuries, the automobile was being driven or its operation directed by a servant or agent of the defendant within the scope of his employment, and further that the driver of, or the person, if any, directing its operation, as an agent of the defendant of the said automobile was guilty of negligence which proximately caused or contributed to the injuries complained of, and further that the plaintiff was not guilty of any negligence which proximately caused or contributed to the injuries.<sup>9</sup>

**Wisconsin**

The third question inquires about alleged negligence of J. M. Now at the time of this collision, J. M.'s automobile was being operated by her agent, R. H. P., and therefore any negligence on the part of her said agent constituted negligence on her part. In considering your answers to this third question you will bear in mind both the conduct at the time of J. M. and the conduct of her agent, R. H. P., and if either one was negligent, that constituted negligence on the part of J. M.<sup>10</sup>

**§ 495. — Violation of instructions or personal use by agent or servant.**

**Arizona.**

If you find that the defendant had given instructions to the driver in charge of the taxicab involved in this action not to drive such taxicab on the country roads, and that the driver of said taxicab requested the said occupants of said taxicab not to drive into the country but to return and obtain a car for such trip, and told them the substance of his employer's instructions, or if the occupants of said taxicab knew of such instructions, then and in that event the plaintiff can not recover in this action.<sup>11</sup>

**California.**

(1) The owner's liability for the acts of a chauffeur is determined when a satisfactory conclusion is reached as to

<sup>9</sup> U-Run-It Co., Inc v Merryman, 154 Va 467, 153 SE 664

<sup>10</sup> Gardner v Brodesser, Circuit Court, Milwaukee County, Wisconsin,

sin, No 95594

<sup>11</sup> Blue Bar Taxicab & Transfer Co v Hudspeth, 25 Ariz 287, 216 P 246

whether at the time in question the servant was acting within the scope of his employment, whether the acts which he was performing were expressly or impliedly authorized by his contract of employment. \* Where the servant acts within the general scope of his authority, notwithstanding the fact that he may be disregarding directions of the employer at the time, the employer may be held liable <sup>12</sup>

(2) If the servant abandons or departs from the business of his master and engages in some manner suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be a servant's individual and exclusive business, and while doing so, negligently commits a tort, the master is not answerable although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to the master.

If the said plaintiff and the said defendant A, on the evening of June —, were on a trip for their own pleasure, or on the business of the plaintiff, and not on the business of the defendant W B A Co, a corporation, and at the time of the accident they were thus engaged, the plaintiff is not entitled to recovery against W B A Co, even though the injuries received by him were due entirely to the negligence and carelessness of the defendant A, and the defendant A at the time was driving and operating an automobile belonging to the W B. A Co

If you believe from the evidence in this case that the plaintiff and the defendant A went on the trip on June —, and left San Jose for the purpose of attending to business of the W B A Co, a corporation, and for any reason afterwards abandoned that business and went on a pleasure trip or entertainment of their own, and that subsequently the defendant A. undertook to drive said plaintiff and said lady guest to their respective homes in San Jose, and that he was so engaged at the time of the accident, then I instruct you that he was not, at the time of the accident, engaged within the scope of his employment, and under such circumstances, the W B. A Co., a corporation, would not be liable for any negligence of his, or for any tort that he might commit <sup>13</sup>

Indiana.

Anyone who has another engaged in his employment is liable for the acts of his servants so long as they are performed within the scope and in the line of the employment for which

<sup>12</sup> Wagnitz v Scharetg, 89 Cal App 511, 265 P 318

<sup>13</sup> Weber v Wiley B Allen Co, 64 CalApp 274, 221 P 663

they are employed. If the employee does something outside of that line of employment and upon his own initiative, or does such that is not within the general scope of the business for which he is employed, then his master or employer is not responsible for his acts. It is only when the act of the servant is done within the general scope and line of his duties for which he is employed, that the employer is responsible. Yet where a servant within the general scope of his employment and duty does commit an injury upon some other person, then the master is liable to him for the damages he sustained by reason of the injury, always bearing in mind, however, the fact that in order to bring liability home to the master, the act of the servant must have been committed while acting or performing his duty within the lines of his duty as herein described, and further conditioned upon the fact that the plaintiff has not by his own negligence contributed to the injury sustained.<sup>14</sup>

#### Kansas

The jury are instructed that one of the defenses made by the defendants is that G. S., while an employee of the defendants, was not engaged in their business at the time of the accident, but that said G. S. was engaged outside of defendants' business, and acting for himself or his father, and was on his own business or the business of his father at the time of the accident.

You are further instructed that this is a good defense, as an employer is not responsible for injuries or damages caused by an employee when not engaged in his business, so that in this case, unless you find that G. S. was actually engaged in his employers' business at the time of the accident, your verdict will be for the defendant.<sup>15</sup>

#### Massachusetts

(1) If at the time of striking the plaintiff, the operator of the automobile was driving the automobile for the sole purpose of going to his own home, he was acting outside the scope of his employment, and a verdict should be returned for the defendants.<sup>16</sup>

(2) The master is liable for the act of a servant in charge of his vehicle when the latter is acting in the main with the master's express or implied authority, upon his business, and in the course of the employment for the purpose of doing the work for which he is engaged. The master is not liable if the servant

<sup>14</sup> *Gainey v. Smith*, Circuit Court, Marion County, Indiana, No. 28886

119, 242 P. 449

<sup>15</sup> *Hausam v. Poehler*, 120 Kan.

<sup>16</sup> *McGrath v. Wehrle*, 233 Mass. 456, 124 NE 253

has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work <sup>17</sup>

#### Missouri

If the chauffeur used the truck for his own use, then it remained so for the entire trip, whether going from defendant's plant or returning to it, unless the master's business is also served on such occasion <sup>18</sup>

#### Nebraska

You are instructed that an employer is not responsible for the negligence of an employee unless the employee was, at the time, performing some duty within the course and scope of his employment. Therefore, in this case, you are instructed that before the plaintiff can recover against G's employer, the N & D Garage, and the members of that partnership, you must find from a preponderance of the evidence that at the time of the collision G was performing some duty for his employer in the course and scope of his employment. The evidence is undisputed that the foreman of the N & D Garage had directed G to deliver a C car to such owner. You are instructed that G's employer would be liable for damages resulting from G's negligence only while he was in the performance of his duties in that regard or following directions given by his employers or foreman. The employer is not relieved of responsibility for such employee's negligence committed while such employee is making a slight deviation or departure from strict compliance with his master's business. However, the employer or master would not be responsible for the negligent act of the employee if the employee makes such a substantial deviation or departure from his master's business as to amount, for the time being, to an abandonment of such duty.

You are instructed that the servant or employee may, on the same trip, combine both his own and his master's or employer's business, and if one of the intended results is to further the master's or employer's business, the master or employer is liable <sup>19</sup>

<sup>17</sup> *Fleischner v Durgin*, 207 Mass 435, 93 NE 801, 33 LRA (NS) 79, 20 AnnCas 1291

<sup>18</sup> *Kaufman v Baden Ice Cream Mfrs, Inc (MoApp)*, 7 SW2d 298. See also *Sullivan v Thurman (Mo*

*App)*, 266 SW 745

<sup>19</sup> *DaFoe v Grantski*, 143 Neb 344, 9 NW2d 488, affirming judgment for plaintiff against both employee and employer

**New York.**

If S was not employed to drive the car, and if he was not instructed to drive the car that night, and took it upon his own authority and his own business, the verdict should be for the defendant.<sup>20</sup>

**Ohio**

The court charges you that if you find from the evidence that at the time of the injury, the automobile of defendant was used by his regularly employed chauffeur with the permission and consent of the defendant for the chauffeur's own pleasure and convenience, and not for any purpose, business or pleasure of the defendant, then the defendant is not liable and your verdict must be for the defendant.<sup>21</sup>

**Virginia**

(1) The court instructs the jury that the driver of the D truck had no authority, express or implied, to permit plaintiff to ride upon the truck, and therefore unless you believe from the preponderance of the evidence that the plaintiff's injuries were wantonly inflicted by the driver of D's truck, you must find for the defendant, D's personal representative.

A servant who is driving an ordinary passenger automobile or freight truck for his master has no ostensible authority by virtue of such employment to suffer, permit, or invite another person to ride therein for a purpose which has no connection with his master's business. One so riding in such an automobile by the sufferance, permission, or invitation of the servant driver, given either in violation of his master's instructions or without express or implied authority from the master to grant such permission, stands as to the master in the shoes of a trespasser. He can not recover from the master for his negligence in permitting the automobile to be operated with defective brakes or other equipment, or for the negligence of his servant in the operation of the automobile, even though the negligence be gross, if it falls short of being such conduct as amounts to the wilful or wanton injuring of the rider.<sup>22</sup>

(2) If you shall believe from the evidence that B. C., at the time of injuring the plaintiff, was going with L. on a trip which he and L. had arranged between themselves for designs of their own, and for their own pleasure, not connected with the business of J. W. C., the said B. C., was not at that time

<sup>20</sup> Frankel v C & E Chapal App 130.  
Frères & Cie (SupCt), 165 NYS 441. <sup>22</sup> Morris v Dame's Exr, 161 Va  
<sup>21</sup> Krippendorf v Bonte, 9 Oh 545, 171 SE 662

acting as agent of J W. C, nor in the scope of his employment.

If, therefore, you shall believe from the evidence that B. C., at the time of inflicting the alleged injuries on the plaintiff, was on a frolic of his own and not engaged as employee or agent in the performance of J W C's business, and at the time was using the car without J W C's knowledge or consent, you shall find in favor of the defendant, J W. C.

The court instructs the jury that, if they believe from the evidence that J W. C, the owner of the car, acquiesced in his chauffeur, B C, transporting his friends free of charge in his (the said J. W. C's) jitney, where the said B. C, said chauffeur, was accustomed to haul passengers, and where he was likely to be hailed by passengers, and although B. C at the time of the injury was not transporting a passenger for hire, that the exhibition of a jitney or taxi sign and the running of said car at a place where the car was apt to be hailed as a jitney, are facts to be considered in determining whether the operation of said car, as aforesaid, at the time of the injury, was within the scope of the chauffeur's employment

The court instructs the jury that, if they believe from the evidence that the car was owned by J W. C., and that J W. C. was in the habit of having said car run by his son, B. C, as a jitney, as his agent, then the burden is on the defendant to show to the satisfaction of the jury that B. C. was not acting in the scope of his employment at the time of the injury.

And you are instructed further that if the defendant fails to sustain this burden, and believe that his son was his agent, you shall find for the plaintiff, provided that you further believe that the said B. C. negligently or unlawfully injured the plaintiff as charged in his notice of motion.

If you shall believe from the evidence that at the time of the injury to the plaintiff B. C., though driving J W. C's car, was not acting as the agent of J. W. C, in the execution of orders given by J W C, or in the prosecution of the business of J W. C., but was using the car for his own purposes and designs, the mere fact that B C. had up until January —, 19—, been employed by J. W C to drive the car as a taxi makes no difference in the case And, even if you shall believe that B. C. was so employed, or acting, on January —, 19—, at the time of the accident, the fact that B. C. may have been in the habit of drinking liquor occasionally does not cut any figure in the case, unless you shall believe the extent and character of his drinking constituted him such a dangerous driver that



it was incumbent on J. W. C. as a reasonable man to see to it that the car be kept out of his possession absolutely. <sup>23</sup>

§ 496. — Family and relatives generally.

North Carolina.

Where a parent owns a car for the convenience and pleasure of the family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parent's consent and approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect.

Under this doctrine the question of liability does not depend on the relation of parent and child, the question is whether the child was using the car for one of the purposes for which it was provided. The consent of the parent need not be express; it may be implied from circumstances, such, for example, as the habitual or customary use of the car <sup>24</sup>

Oregon

Where a father provides an automobile for the purpose of furnishing members of his family with outdoor recreation, the use of the car for such purpose is within the scope of the father's business.

One who keeps an automobile for the pleasure and convenience of himself and his family is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family. <sup>25</sup>

Pennsylvania.

But it is for you to determine whether it is the fact that the owner of the machine in this case allowed the machine to be used. If you believe it was under the control of a member of her family, if you believe that in that way, the natural way, in a common, ordinary way, this automobile was permitted to be used for the benefit and pleasure of members of the family, then it would be for you to say whether or not it would be a legitimate inference to draw that it was being used within the scope of the employment of the chauffeur, and if so, if he was negligent, the defendant in this case would be responsible. <sup>26</sup>

<sup>23</sup> Crowell v Duncan, 145 Va 489, 134 SE 576, 50 ALR 1425

<sup>24</sup> Grier v Woodside, 200 NC 759, 158 SE 491

<sup>25</sup> Foster v Farra, 117 Or 286, 243 P 778

<sup>26</sup> Hazzard v Carstairs, 244 Pa 122, 90 A 556.

Virginia.

You are further instructed that the fact that the car which B C was driving on this occasion was owned by J. W C, and that the members of his family, including B C, were accustomed to drive it whenever they wished to do so, is not sufficient to constitute B C the agent of J W C in this case nor to make him liable on this ground for alleged damages done to J. A D.<sup>27</sup>

§ 497. —Parent and child.

Alabama

The court charges the jury that, if they are reasonably satisfied from the evidence that the defendant merely permitted her daughter, E F, to operate the car for the daughter's own pleasure, they can not find a verdict for the plaintiff

The court instructs the jury that, if you are reasonably satisfied from the evidence in this case that the automobile driven by Miss E F at the time of the accident belonged to Mrs A M F, the defendant in this case, and she instructed her daughter to take Miss B. F to school on the morning of the accident, and Miss E F, obeying the instructions of her mother, drove Miss B F to school, and at the time of the accident she was returning home, and had no other purpose in driving said automobile on that occasion, then she was acting within the line or scope of her employment by the defendant, and the fact that she was not taking the most direct route to go home, would not necessarily take her without the line or scope of her employment by her mother, and if you are further reasonably satisfied from the evidence in this case that Miss E F negligently drove her car against the car in which the plaintiff was riding and as a proximate result of such negligence the plaintiff was injured, you should find a verdict for the plaintiff.

Now, the question as to the title to the automobile in question is not the controlling factor of liability in this case. The defendant could be liable, or could not be liable, if she in fact owned the M——— automobile, or she could be, or could not be, liable if she did not own the M——— automobile.

So, likewise, is the question of the paternal relationship of the daughter in the case to the mother. Ordinarily that is a matter immaterial to lawsuits in an ordinary proposition where

<sup>27</sup> Crowell v Duncan, 145 Va 489,  
134 SE 576, 50 ALR 1425

a child is 21; ordinarily that is not a material issue in the case, but in the instant case the relationship of the family living under one roof is a matter which may be taken by the jury into consideration in arriving at whether or not, at the time of the accident, the daughter, Miss E F, was then and there carrying out as an agent or servant the instructions of her mother

However, from the relationship of mother or daughter or whatever that relationship, there is no presumption of agency on the part of this young lady other than what the evidence discloses under all of the circumstances in the case, and what inference you may reasonably draw from the fact, if it be a fact, and it be established to your reasonable satisfaction by the evidence in the case, that she was, at the time, living in the same house with her mother and whether or not she was at that time doing errands for and at the instance of her mother, either by express or implied instructions, is a question for you to determine and the court has nothing to intimate as to the course you should pursue on that subject <sup>28</sup>

#### Arkansas

If the collision occurred after she had resumed the performance of the errand for her father, it is immaterial whether she had just previously to that time performed an errand of her own

If you find the defendant, A. R., had authorized his daughter, E K H., to act for him in taking his child to school and bringing her from school when he was not present and had given her general authority to do so, it would not be necessary for him to give her special or specific directions or authorization in every instance <sup>29</sup>

#### California

I instruct you that a father who is not guilty of personal negligence in the matter is not liable for damages sustained by third parties by reason of the negligent driving of an automobile by an adult member of his family, when such member of the family is using the same for his or her own purposes, and not those of the father, the automobile being owned and maintained by the father for the general convenience, use, and pleasure of his family, and the particular member of the family operating the same having his permission to use the same at his or her pleasure <sup>30</sup>

<sup>28</sup> Feore v Trammel, 213 Ala 293,  
104 S 808

<sup>29</sup> Richards v McCall, 187 Ark 61,  
58 SW2d 432 See also Volentine v

Wyatt, 164 Ark 172, 261 SW 308

<sup>30</sup> Grillich v Weinshenk, 64 Cal  
App 474, 222 P 160

**Connecticut**

(1) The test for the jury is this Was the act of borrowing the automobile the natural and ordinary act for the ordinarily competent and prudent person, conducting this work as the son was permitted to conduct it, and in the light of the circumstances as presented to him?

If you find the son was, at the time of the accident, the employee of defendant, and that his act in driving the automobile was done in the course of defendant's business, and that the authority from the defendant for the son so to do was fairly to be implied from the nature of his employment and his duties for the defendant and the manner in which he had performed them with the knowledge of the defendant, the liability of the defendant, caused by the negligent operation of the automobile, must follow <sup>31</sup>

**Indiana**

If you find from the evidence in the case that defendant D F was not driving or in control of and did not own the automobile in question and that neither the other defendant driving the car nor said D. F. was at said time engaged upon any business or errand of said D. F., but that he was merely an invited guest of his son, the other defendant, then and in that event there can be no liability against said D F. and your verdict should be in his favor <sup>32</sup>

**Iowa.**

First then, as the defendant was not in the car, he would not be liable for any damages caused by any negligence in its use, unless it was being run by some agent or servant of his, that is, some one who with his authority represented him, and was at the time being used in his service or business Plaintiff says that it was so being run; that it was operated by defendant's son and was occupied by several members of defendant's family As to that it is the law, and I so instruct you, that if a man owns a car which he keeps, among other things, for use as a pleasure vehicle by his family and permits his son to drive it, if his son takes the mother out for a drive in the car, the son would be the agent of the father, and the car under such circumstances would be used in the father's service, the furnishing of comforts and enjoyments within his means to his wife and family being part of a father's business or service Hence, in this case, if you find that Dr A. kept this car for use as a

<sup>31</sup> Russo v McAviney, 96 Conn Court, Marion County, Indiana, No 21, 112 A 657 46974

<sup>32</sup> Webster v Freije, Circuit

family car and permitted his son to take his wife out in it, you would be warranted in finding that on this occasion the son was his agent and was using it in his father's service. As above stated, the burden is upon the plaintiff to prove this by a preponderance of the evidence. If he has not done so, you should proceed no further, but should find a verdict for defendant. If he has done so, you should proceed to the second point.<sup>33</sup>

#### Maine

(1) Liability can not be cast upon the defendant in this case because he owned the car, or because the driver at the time of the accident was his son, or because he permitted his son to use the car. There must be the further relation of master and servant between them, and the son at the time of the accident must have been using the car in the business of the defendant.<sup>34</sup>

(2) If the defendant riding with her daughter retained such control of the car as gave her the right to direct how it should go, and who should drive it, and how it should be driven, then you may properly find that the defendant is responsible for the negligent acts of the daughter, in driving the car.<sup>35</sup>

#### Maryland

The jury is instructed at the instance of the defendant that, if they find from the evidence that D W was using the automobile of the defendant, W A W, at the time of the happening of the accident complained of, solely for his own business or pleasure, with or without the knowledge or consent of his father, the said W A W., then their verdict must be for the defendant.<sup>36</sup>

#### North Carolina

So, under our law when it is shown that the son on various occasions has driven an automobile belonging to his father, with his knowledge and with his consent, with his permission and with his authority, that is sufficient to carry it to the jury and the burden shifts to the defendant, the father in this case, to explain the relationship and to show he did not have authority on that particular occasion.

Where a parent owns a car for the convenience and pleasure of the family, a minor child who is a member of the family, though using the car at the time for his own purposes with the

<sup>33</sup> Lemke v. Ady (Ia), 159 NW 1011

<sup>34</sup> Farnum v. Clifford, 118 Me 145, 106 A 344

<sup>35</sup> Fuller v. Metcalf, 125 Me 77, 130 A 875

<sup>36</sup> Whitelock v. Dennis, 139 Md 557, 116 A 68

parent's consent and approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect

Under this doctrine, the question of liability does not depend on the relation of parent and child; the question is whether the child was using the car for one of the purposes for which it was provided. The consent of the parent need not be express, it may be implied from circumstances, such, for example, as the habitual or customary use of the car <sup>37</sup>

#### Oregon.

(1) The parent may make the child his servant or agent, and this, as in the case of other persons, may be done expressly or be inferred from the conduct of the parent, and, when the relation of master and servant or principal and agent is created between a parent and his child, the parent is responsible to third parties for the negligence of the child while such child is acting in the course of his employment and engaged in the business of the parent <sup>38</sup>

(2) The plaintiff contends that the defendant, H F, was at the time of the accident using the automobile for family purposes. The law is that whenever the vehicle is obtained to carry out the general purpose for which the owner keeps it, anyone driving such machine with the owner's consent, express or implied, is the owner's agent

In this case, if you find from the evidence that the automobile was obtained by H F to carry out the general purpose for which his father, W H F, kept it, and that said automobile was, at the time of the accident, being driven with the consent of the owner, W H F, which consent may be either express or implied, then the said H F was the agent of the owner at the time of the said accident

If you find from the evidence that said H F was the agent of the father under the rules just recited, and you further find against the defendants under the prior law as previously outlined, then you will proceed to a consideration of the question of damages <sup>39</sup>

#### Utah

A parent is not liable for the negligence or tortious act of his minor child merely by reason of the relation existing between them, and as a general rule, such doctrine is applicable in

<sup>37</sup> Grier v Woodside, 200 NC 759, 2 P2d 233, 3 P2d 987  
158 SE 491

<sup>39</sup> Foster v Farra, 117 Or 286,

<sup>38</sup> Millar v Semler, 137 Or 610, 243 P 778

actions for negligence against the parent to recover for an injury resulting from the operation of the parent's car by his minor child, but the minor may become a servant or agent of the parent, whereby the parent, on the theory of master and servant, or on the doctrine of respondeat superior, may become liable when the automobile is operated within the scope or in the course of the employment and in pursuit of the parent's business <sup>40</sup>

#### Virginia

If you should believe from the evidence that B C, at the time of the accident was acting as agent of his father, the evidence of his alleged habit of occasional drinking is to be considered by you only in determining whether or not J W C knew, or by the exercise of reasonable care could have known, that he was on that account not a reasonably safe and competent driver, and, unless you shall believe from the evidence that B C was on that account an unsafe and incompetent driver, and that J W C knew, or by the exercise of reasonable diligence, could have known that he was, no liability can attach to J W C on that ground

The court instructs the jury that an automobile in the possession of and driven by a person under the influence of intoxicants is a dangerous instrumentality. And the law places the duty on an owner of an automobile to use due care in preventing such use of said car, when the owner knows or has reason to know that one who has been operating the same is addicted to intoxicants

And if the jury believe that J W C knew or had reasonable cause to believe that his son was addicted to intoxicants, then he owed to the plaintiff and the public at large, the duty of exercising due care to prevent the use of said car by his son

The court instructs the jury that, if they believe from the evidence that the plaintiff was injured as alleged in his notice, that the said injuries were caused by the negligent or unlawful act of the said B C, and if they further believe that the said B C was driving the automobile at the time of the accident in a reckless manner on account of being then and there under the influence of intoxicants, and if they further believe he was in the habit of getting under the influence of intoxicants for some time prior to the accident, and that his father, J W. C, knew or had reasonable cause to know of the habits of his son, then he is liable for the acts of his son, while running said auto-

<sup>40</sup> Wilcox v Wunderlich, 73 Utah  
1, 272 P 207

mobile under the influence of intoxicants, unless the jury believe from the evidence that J W C took effectual means to prevent the use of his automobile by his son

The court instructs the jury that, if they believe from the evidence that the car was owned by J W C, and that J W C was in the habit of having said car run by his son, B C, as a jitney, as his agent, then the burden is on the defendant to show to the satisfaction of the jury that B C was not acting in the scope of his employment at the time of the injury

And you are instructed further that if the defendant fails to sustain this burden, and believe that his son was his agent, you shall find for the plaintiff, provided that you further believe that the said B C negligently or unlawfully injured the plaintiff as charged in his notice of motion

You are instructed that whether or not J W C. in this case is responsible for damages inflicted by the alleged negligence of his son, B C, rests upon and must be determined by you upon the inquiry as to whether or not B C at the time of the accident was acting as agent or employee of his father, J W C, and the mere fact that B C is the son of J W. C has no bearing upon that inquiry Liability can not be cast upon J. W C because he owned the car or because his son, B C, was the driver on this occasion, but must depend upon whether or not at the time B C was driving the car as an employee of his father in the furtherance or performance of the business of J W C or in the execution of the latter's orders or directions, unless you believe from the evidence that J W C permitted his son to run said car when he knew or had reason to believe that he was not a safe person to run said car <sup>41</sup>

**Wisconsin.**

(1) A father is not liable for the negligent operation of his automobile by his minor son merely because of the relationship of parent and child between them Liability of the father for such negligence of his minor son must be predicated on the principles of agency <sup>42</sup>

(2) The words "request" and "benefit" as used in the question which will be submitted to you are not to be given a narrow or limited meaning A request is "the expression of one's desire to another person that he should do or give something" (Standard Dictionary), "the expression of desire to some person for something to be granted or done" (Century Dictionary

<sup>41</sup> Crowell v Duncan, 145 Va 489,  
134 SE 576, 50 ALR 1425

<sup>42</sup> Crossett v Goelzer, 177 Wis  
455, 188 NW 627



and Cyclopædia) A request may be expressed or implied An express request may, and probably usually does, occur by one person asking another person to do or give something, but, one can make a request without directly asking that the desired thing be done or undertaken If one person expresses a desire to another person that the latter do or undertake to do some thing, such as the trip in question, that would be a request, although there may be no direct question put, whereby the one formally asks the other to do or undertake the matter in hand An express request may also take the form of an answer to a question, for instance, if one person asks another whether the former shall do a certain thing, and the latter answers in the affirmative, that would amount to a request or the expression of the latter's desire that the thing be done. Again an express request may take the form of a command or direction from one in authority addressed to another who is bound to obey the command or heed the direction given.

The word "benefit" in the question which will be submitted to you does not necessarily mean a pecuniary profit or monetary gain It includes any other helpful result or advantage attained or sought by the person for whom the thing is done or undertaken It may consist of an advantageous or helpful result to a person whereby he himself escapes or avoids the doing of a thing which he desires to have done

You are instructed that if you believe from a fair preponderance of all the credible evidence in the case, that the defendant H G expressed to his son, E, a desire that the latter undertake the trip in question and that the undertaking of the trip would result in some help or advantage to the father, then the trip was undertaken at the request of the father and for his benefit and you should answer the question "Yes" <sup>43</sup>

#### § 498. — Husband and wife.

##### Alabama

The court charges the jury that while the fact that the automobile belonged to Mrs K is not sufficient in itself to make her responsible for the acts of Mr K in driving the car, the fact that Mrs K authorized Mr K. to drive her car, in which she was then riding, is sufficient to make her responsible for his negligent acts in the operation of said automobile <sup>44</sup>

##### Arizona

If you find that the defendant, M. S, was operating the car

<sup>43</sup> Zeidler v Goelzer, 191 Wis 378, 211 NW 140 See also Hopkins v Droppers, 184 Wis 400, 198 NW 738, 36 ALR 1156  
<sup>44</sup> Kelly v Hanwick, 228 Ala 336, 153 S 269

in the community enterprise of herself and her husband, that even though the husband was not driving, not personally at the time responsible for the injury, yet he will be bound equally with the defendant M S, if you find against her. That is, if you find that the sole proximate cause of the injury was her negligent operation of the automobile, you will find against the defendants jointly—that is, J S and M S <sup>45</sup>

#### California

Where proof is made that the car in question was owned by the husband, and was being operated by the wife at the time of the accident, with his express consent and permission, there is created a prima facie case authorizing an inference by the jury, in the absence of substantial proof to the contrary, that the wife was using the car as the agent of the husband <sup>46</sup>

#### Connecticut

If you find that one of the purposes of the defendant in buying and keeping the automobile, which was driven on the occasion of this injury by his wife, was to give pleasure to members of his family by permitting them to use the car for their own pleasure, then his wife, while using the car for her own pleasure on this occasion in accord with such purpose of the defendant, was using the car in the performance of the defendant's business within the scope of her authority, and she was his agent, and if you find that the plaintiff's injury was caused by the negligence of the wife while so acting, and the plaintiff was free from any contributory negligence, your verdict should be for the plaintiff. <sup>47</sup>

#### Iowa

In this case it appears from the uncontradicted evidence that the automobile in question was being handled and operated by the defendant, Mrs B W M. You can not find the defendant Mr B W M. liable under the evidence in this case, without finding that his codefendant was negligent in some of the respects charged in plaintiff's petition, and that the plaintiff has established by a preponderance of the evidence, the other material allegations of his petition against the said Mrs B W M, but if you find the said defendant, Mrs B W M, liable in this case, and you further find, by a preponderance of the evidence, that the said defendants, at the time of the matters complained of, were engaged in a common enterprise, or that the automobile in which the defendants were riding was under the

<sup>45</sup> Selaster v Simmons, 39 Ariz 297 P 554  
432, 7 P2d 258

<sup>47</sup> Stickney v Epstein, 100 Conn

<sup>46</sup> Perry v McLaughlin, 212 Cal 1, 170, 123 A 1

control of the defendant Mr B W M., then you will find that the negligence, if any, of Mrs B W M, was the negligence of the defendant Mr B W M, and in such case, if either defendant is liable, both will be. If, however, the defendants were not engaged in a common enterprise, or the defendant Mr B W M did not have any control over the use of the car in question, but was a guest therein, then the negligence of defendant Mrs B W M, if any, could not be imputed to him, and he would not in any event be liable in this case.

In determining whether or not the defendant Mrs B W M, in driving the car in question, was under the control or in the service of the defendant Mr B W M at the time of the injury complained of, you will consider that the relation of master and servant can not be predicated or arrived at alone from the relation of husband and wife, nor can the same be presumed merely from the fact that he was the owner of the automobile which she was driving at the time. The fact that the defendants were husband and wife, and that he was accompanying her in the automobile and was the owner thereof, will not alone justify you in finding that she was under his control at the time of the alleged injury; but such facts are proper to be considered by you in connection with all the other facts shown in evidence, in determining whether or not the defendants were at the time of the accident, pursuing a common purpose, or whether or not the defendant Mr B W M did participate in the control of the use of the car at such time.<sup>48</sup>

#### § 499. — Acts of independent contractors.

##### Arkansas

If you find from the evidence that at the time of the collision the defendant, J H B (automobile salesman) was an independent contractor, then, you are instructed that the defendant K G C (employer) cannot be liable for the alleged acts of negligence, if any, of the said J. H B. An independent contractor is one who, exercising an independent employment, is employed to perform a specific task according to his own methods, and without being subject to the control of his employer, except as to the result of the work, and in this case, if you find that the said J H B, even though you find he was employed by the said K G C as an automobile salesman, chose his own method of performing his work, furnished his own means of working, and was not responsible to the said K G. C except

<sup>48</sup> Crawford v McElhinney, 171  
Ia 606, 154 NW 310, AnnCas 1917E,  
221

as to the results produced, and that he paid all his expenses of his employment, and chose his own means, time and place of working, then, in that event, he would be an independent contractor, and if you find that he was such an independent contractor at the time alleged, your verdict must be for the defendant, K G C <sup>49</sup>

#### Michigan.

It is for you to say what the relationship was, if any existed between B and the defendant transport corporation, and the burden of proof is on the plaintiff to prove the existence of the relationship, whatever it was

Now, then, as to what the relationship was between B and the defendant corporation, transport corporation, if any relationship existed, on that subject the law of the state of Michigan will govern

Now, members of the jury, what is an independent contractor, and what is meant by the relationship of master and servant or employee? Where the person whose negligence has caused the injury, has contracted only for results and is independent and free from direction or restraint in the performance of his obligation, he is an independent contractor. In cases where the essential object of an agreement is the performance of the work, the relation of master and servant will not be predicated as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed

A servant is a person subject to the command of his master as to the manner in which he shall do his work. The relation of master and servant exists where the master can order the work and direct how it shall be done. When the person to do the work may do it as he pleases, then such person is not a servant <sup>50</sup>

#### Missouri.

If you find from the evidence that the truck mentioned in evidence belonged to one G., and that B, the driver mentioned

<sup>49</sup> *Hutcheson v Clapp*, 216 Ark 517, 226 SW2d 546

The case cited involved actions by three owners of parked automobiles which were damaged by the negligence of the automobile salesman, who was joined with his employer in the action as defendants. Verdicts

were rendered for the plaintiffs against the salesman, but in favor of his employer. Plaintiffs appealed. Judgments affirmed.

<sup>50</sup> *Hazard v Great Cent Transport Corp*, 270 Mich 60, 258 NW 210

in evidence, was employed by G, and under his general control, yet, if you further find from the evidence that said G hired said truck and driver to the defendant for the purpose of hauling said coal in said truck from its coal yards and delivering the same to such of its customers as it should thereafter designate from time to time, and that in so doing the said driver was under the special orders of the defendant and its right of direction as to the manner or method of operating said truck, and that among such orders was one given on September —, 19—, by defendant to said driver to haul coal in said truck from its Lydia Avenue Yards in Kansas City, Missouri, for delivery to one of its customers at No 700 East Twenty-Fifth Street in said city, then you are instructed that B's relationship to defendant was not that of an independent contractor responsible only for results, but that he was a servant of said defendant and that defendant is liable for any acts of negligence of said B, if he was negligent, in the managing or driving of said truck while he was on the way from said yards to said place of delivery pursuant to such orders, even though said B. was paid by said G and defendant paid the latter by the ton for such haulage <sup>51</sup>

#### New York

If you find in this case that this contract between A & A and the H Hospital required A & A to furnish the driver of this car, then no matter whether B directed the driver where to go, or at what speed to go, such directions, of themselves, did not make M the servant of the H Hospital, or render his negligence imputable to the H. Hospital, and there can not be any recovery from these facts against the H Hospital <sup>52</sup>

### § 500. —Occupant other than owner or operator; joint enterprise. <sup>53</sup>

#### Alabama

When two or more people are engaged in a joint adventure, each is responsible for the torts committed by the other while acting directly in the business of the joint enterprise. If the jury are reasonably satisfied from the evidence that defendant D and defendant W were taking the car to Tuscaloosa together for the C M Co., and that part of the time one was driving and part of the time the other was driving the car, and that both had equal control of the car, then the court charges the jury that it is open to the jury to find from the

<sup>51</sup> Renfro v Central Coal & Coke Renting Co, 190 AppDiv 39, 179 Co 223 MoApp 1219, 19 SW2d 766 NYS 675.

<sup>52</sup> Baker v Allen Arnink Auto <sup>53</sup> See also §§ 336, 397, *supra*

evidence that both W. and D were engaged in a joint enterprise and each would be responsible for the driving of the car, whether the one or the other was actually at the wheel at the particular moment that the accident happened <sup>54</sup>

California.

Parties can not be said to be engaged in a joint enterprise within the meaning of the law of negligence, unless there is a community of interest in the objects or purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other with respect thereto Each must have some voice and right to be heard in its control and management <sup>55</sup>

Kentucky.

An invitee riding in a vehicle driven by the owner or his servant or agent is not responsible for the negligence of the driver <sup>56</sup>

Texas

If defendant, in seizing the wheel, did what an ordinarily prudent person would have done, she was not guilty of negligence But if an ordinarily prudent person would not have seized the wheel, then she was guilty of negligence <sup>57</sup>

## § 501. — Seller.

New Jersey

As you have heard the court already direct, it makes no difference which one of these men, M. or H, was operating this automobile, because the automobile was being demonstrated by H. for M, who was the possible or probable purchaser of that automobile H. was a licensed driver M had a permit, and the automobile was being driven under the direction and guidance of H, who was the employee of the defendant in this case So the circumstances in this case are such that, if either H or M was negligent in the operation of this automobile, the defendant is responsible for that negligence <sup>58</sup>

Oregon.

(1) If you find from the evidence in this case that the defendants made an agreement with C wherein and whereby they were to turn over to C certain second-hand automobiles, and that after they turned over these second-hand automobiles to

<sup>54</sup> Crescent Motor Co v Stone, 211 Ala 516, 101 S 49

Saunders, 229 Ky 284, 17 SW2d 233

<sup>57</sup> Hooks v Orton (TexCivApp),

<sup>55</sup> Curran v Earle C Anthony, Inc, 77 CalApp 462, 247 P 236

30 SW2d 681

<sup>56</sup> Consolidated Coach Corp. v

<sup>58</sup> Doyon v Massolme Motor Car Co, 98 NJL 540, 120 A 204.

C, the defendants had no further control or direction over said automobiles, and if you further find that at the time of the accident complained of in the complaint that C was driving one of these second-hand automobiles belonging to the defendants, and that the said defendants had nothing to do with the automobile at the time and that at the time C was demonstrating said automobile, he was doing so exclusively in his own business, then and in that event you are instructed that the plaintiff can not recover in this action, and your verdict should be for the defendants

If you find from the evidence that the defendants did select this man C, who was driving the automobile at the time of the accident, and you further find that the defendants had the power to discharge him and had the right to direct what work should be done and the way it was to be done, then you are instructed that the said C was the defendants' servant at the time of the accident.

If you find from the evidence that C at the time of the accident was defendants' servant, and you further find that C was demonstrating the automobile for a prospective purchaser, and that the same was done for the benefit of and in furtherance of defendants' business, then you are instructed that defendants are responsible for the acts of said C <sup>59</sup>

(2) If you find from the evidence that defendant R had sold the automobile driven by defendant O to defendant prior to the accident, then your verdict should be for the defendant R. In this connection I instruct you that, if defendants R. and O had an understanding that the title of said automobile passed from defendant R prior to the accident, for which defendant O was to pay defendant R at a later date, this would constitute a sale, even though the purchase-price was not paid <sup>60</sup>

#### § 502. — By lessee or his agent.

##### Arkansas

Where there is a hiring of an automobile, or other vehicle, by the owner who furnishes the driver, and the hirer exercises no control over the driver except to direct him when and where to go, the driver is the servant of the owner, and not of the hirer, and the former is responsible, as master, for damages caused by the driver's negligence. <sup>61</sup>

<sup>59</sup> Houston v Keats Auto Co., 85 239 P 112  
Or 125, 166 P 531

<sup>61</sup> Dubisson & Goodrich v McMil-

<sup>60</sup> Ramp v. Osborne, 115 Or 672, 11n, 163 Ark 186, 259 SW 400

owner has turned such rented vehicle and driver over into the control of the person renting or leasing same, then such latter person stands in the same position with third persons as though he were the owner, and is liable to such third persons for all injuries caused by such vehicle or truck, due to the negligence and want of care of the driver of same.<sup>64</sup>

<sup>64</sup> Olson v. Clark, 111 Wash 691,  
191 P 810.



## CHAPTER 12A

### SPECIAL VERDICTS <sup>1</sup>

Section	Section
503. (Reserved).	511. Defendant's automobile disabled and left standing without lights on concrete roadway.
504. (Reserved).	512. Collision of bus with automobile resulting in injury to several plaintiffs by causing one automobile to collide with another automobile.
505. Recovery of damages denied.	513. Truck wrecked by leaving roadway and striking tree; resulting death of alternate driver of truck who was asleep.
506. Pedestrian injured while on sidewalk.	514. Collision between two trucks, causing death of driver of one of them.
507. Head-on collision of automobile with truck at curve on icy roadway.	
508. Pedestrian injured at street crossing.	
509. Pedestrian on country concrete road killed by automobile in night-time.	
510. Collision of one automobile with rear of another automobile which was about to turn off roadway.	

§ 503. (Reserved).

§ 504. (Reserved).

§ 505. Recovery of damages denied.

We, nine or more of the jury in the above entitled cause, do find as follows: On September —, 19—, plaintiff was riding in defendant's automobile, being then and there driven by A. D., plaintiff's brother, at defendant's request—to which plaintiff did not object. They were returning from a place in Ashtabula County, coming west on Euclid Avenue toward Cleveland in the roadway reserved exclusively for west-bound traffic. It was raining slightly.

At about Stop 212 east of Cleveland, after passing three automobiles proceeding in the same direction at about 25 miles per hour, said passing being to the left of said automobiles, the left wheels of the defendant's automobile left the pavement on the left side and in trying to regain the pavement, said automobile skidded immediately to the right, and the right side of the automobile struck a telephone pole just north of the northerly or right-hand side of the pavement, which was twenty feet wide.

<sup>1</sup> See §§ 111, 112, 161, 181, Volume I.

At the time of said concurrence the driver of said automobile was keeping a sufficient lookout, was driving at a reasonable rate of speed, had his car under proper control until he began to skid and neither theretofore nor thereafter was there anything he could have done in the exercise of ordinary care to avoid the accident. He was unable to divert the course of the automobile after it suddenly began to skid. If, upon these facts, the court is of the opinion that the plaintiff is entitled to recover, we do find that plaintiff has been damaged in the sum of no compensation. [Signed by ten jurors]<sup>2</sup>

**§ 506. Pedestrian injured while on sidewalk.**

The jury in this case, being duly empaneled and sworn, upon the concurrence of the undersigned jurors, being not less than three-fourths of the whole number thereof, do find and return this special verdict:

Q. 1. Do you find that the defendant, The D-F Company, was a corporation? A. —.

Q. 2. Do you find that East 152nd Street was a public thoroughfare in the City of Cleveland, Ohio? A. —.

Q. 3. Do you find that East 152nd Street ran in a general northerly and southerly direction? A. —.

Q. 4. What was the width of East 152nd Street from curb to curb? A. — feet.

Q. 5. Was the plaintiff walking in a southerly direction on the easterly sidewalk of East 152nd Street at the time the accident occurred? A. —.

Q. 6. Was the automobile operated by Mr. C. traveling in a southerly direction on the westerly side of East 152nd Street, before said automobile commenced to skid and swerve in an easterly direction? A. —.

<sup>2</sup> Nosed v. Delmul, 123 OhSt 647, 76 ALR 1133, 176 NE 571, affirming judgment for defendant entered pursuant to the foregoing verdict.

It was held that the foregoing verdict contained some conclusions of law, but it was not vitiated on that account, since it also contained essential facts from which the court could properly render judgment for the defendant. It was also held

that the verdict was not invalid because it failed to find ultimate facts on all issues; that when certain of the issues are not determined they are to be regarded as not proved by the party having the burden of proof.

Effective 10-4-55, the court, when requested by either party, submits in writing each determinative issue to be tried by the jury. Ohio Rev. Code, § 2315.15.

Q. 7. Did said automobile operated by Mr. C. swerve and skid to its left, turn around and cross East 152nd Street from the westerly side to the easterly side and go over the easterly curb and over and across the easterly sidewalk and collide with the plaintiff and knock the plaintiff over the retaining wall at the easterly edge of said easterly sidewalk and pin and jam the plaintiff against said retaining wall so that he was caught between said automobile and said retaining wall? A. —.

Q. 8. Did the driver of said automobile know that the roadway of said East 152nd Street was in an icy and slippery condition? A. —.

Q. 9. At what rate of speed was said automobile being operated immediately before and at the time said automobile commenced to skid and swerve? A. — miles per hour.

Q. 10. Was said automobile being operated on a down grade at the time and place where said accident occurred? A. —.

Q. 11. Did the driver of said automobile fail to sound any warning by horn or otherwise of his approach to and over the easterly sidewalk of said East 152nd Street? A. —.

Q. 12. Did the automobile swerve and skid and travel over on to its left or wrong side of East 152nd Street while traveling in a southerly direction thereon? A. —.

Q. 13. Did the defendant, The D-F Company, a corporation, furnish gasoline books to Mr. C. for the purpose of obtaining gasoline to maintain, use and operate the automobile on business for said defendant corporation, The D-F Company? A. —.

Q. 14. Was the soliciting of customers for The D-F Company, a corporation, by Mr. C. a part of the business of said company, The D-F Company, a corporation? A. —.

Q. 15. Was the gasoline book given to Mr. C., the driver of said automobile, by The D-F Company, a corporation, for his use to get gasoline to run said automobile on business for said The D-F Company, a corporation? A. —.

Q. 16. Was Mr. C., the driver of said automobile, using said automobile on business for the defendant, The D-F Company, a corporation, on the afternoon of said date of February —, 19—, as to soliciting customers for said corporation? A. —.

Q. 17. Was Mr. C., the driver of the automobile on said date of February—, 19—, using said automobile as to the distribution of general advertising matter and literature for and

on behalf of The D-F Company, a corporation, and on their business? A. —.

Q. 18. Was the driver, Mr. C., on said date of February —, 19—, using said automobile on company business for the defendant, The D-F Company, a corporation, in and about soliciting customers for said defendant and while on his way back to the office of the defendant to keep an appointment with a prospective customer of defendant as to the purchase of a C—— automobile, for which the defendant operated a sales agency? A. —.

Q. 19. From approximately 2:00 o'clock P. M., on said date of February —, 19—, on up to the time of the happening of the accident to the plaintiff in this case, was Mr. C., the driver of said automobile, on company business for the defendant corporation as to soliciting customers for the defendant, The D-F Company, a corporation, as to calling upon Mr. A., Mrs. W., Mr. N., and in and about the distribution of the general advertising matter and literature such as pamphlets and catalogues descriptive of the automobiles sold by the defendant corporation, and on Mr. C.'s way back to the office of the defendant, after making said calls on said parties and after the distribution of said literature? A. —.

Q. 20. Was said automobile being driven and used by the driver, Mr. C., for and on behalf of the defendant corporation, The D-F Company, and on said company's business as to soliciting customers for the defendant corporation at the time of the happening of the accident to the plaintiff? A. —.

Q. 21. Do you find by the greater weight of the evidence that the plaintiff sustained an injury to his right leg and his left leg as a proximate result of the collision between said automobile and said retaining wall? A. —.

Q. 22. Do you find by the greater weight of the evidence that the plaintiff sustained and suffered physical pain as a result of his injuries sustained in said accident? A. —.

Q. 23. Do you find by the greater weight of the evidence that the plaintiff sustained a shock to his general nervous system as a direct result of the happening of said accident and the sustaining of said injuries? A. —.

Q. 24. Do you find by the greater weight of the evidence that the plaintiff sustained an injury to the bone of his right leg? A. —.

Q. 25. Do you find by the greater weight of the evidence that there was a puncture and tearing of the flesh on plaintiff's right leg? A. —.

Q. 26. Do you find by the greater weight of the evidence that the plaintiff suffered from a condition of periosisitis as a result of the injury to his right leg? A. —.

Q. 27. Do you find by the greater weight of the evidence that the plaintiff is still, at the present time, suffering from said injuries to his right leg? A. —.

Q. 28. Do you find by the greater weight of the evidence that, at the present time, there is evidence still remaining of the injury to plaintiff's right leg? A. —.

Q. 29. How long was plaintiff confined to the hospital for treatment of his injuries? A. — days.

Q. 30. What was the amount of the expense incurred by plaintiff as to medical, surgical and hospital care and attention in and about his efforts to heal and cure his wounds and injuries? A. Approx. \$—.

Q. 31. What was the plaintiff's monthly earnings at the time of the happening of said accident? A. \$—.

Q. 32. How long was plaintiff disabled from the doing of his usual and ordinary work as a result of the injuries he sustained in said accident? A. — months.

Q. 33. What was the amount of his loss of wages resulting from his disability on account of said injuries? A. \$—.

Q. 34. How long was plaintiff required to use crutches in order to walk and move about? A. — weeks.

Q. 35. Do you find by the greater weight of the evidence that it is reasonably certain that plaintiff will suffer pain in the future as a direct result of said injuries? A. —.

Q. 36. Bearing in mind the elements of damage which you find above, what sum of money will fully and adequately compensate plaintiff therefor? A. \$——.<sup>3</sup>

<sup>3</sup> Dowd-Feder Co. v. Schreyer, 124 OhSt 504, 179 NE 411, affirming judgment for plaintiff entered pursuant to the foregoing verdict.

In the case cited, counsel for defendant requested the court to direct the jury to return a special verdict in writing under the provisions of Ohio Rev. Code, § 2315.15 and submitted a proposed special

verdict in narrative form, which the jury rejected. Counsel for plaintiff submitted the foregoing verdict with the interrogatories attached, which the jurors answered.

It was held that such special verdict may be in a narrative form or in the form of answers to questions submitted, but in either event, must contain the ultimate facts from

**§ 507. Head-on collision of automobile with truck at curve on icy roadway.**

We, the jury, for our special verdict answer the questions submitted as follows:

Q. 1. At the time of the collision between the plaintiff's automobile and the defendant S.'s truck on January —, 19—, was defendant S., in his manner of operating his truck, negligent in any of the following particulars:

- (a) Did he fail to keep a sufficient lookout and sufficient control of his truck? A. —.
- (b) Was he proceeding at an excessive rate of speed? A. —.
- (c) Was he operating his truck on the wrong side of the roadway? A. —.

Q. 2. If you answer "Yes" to any of the inquiries in the first question, then answer the corresponding inquiries here following: Was the collision in question a natural result of such negligence of S.,

- (a) In respect to lookout and control? A. —.
- (b) In respect to speed? A. —.
- (c) In respect to being on the wrong side of the roadway? A. —.

Q. 3. At the time of said collision was the plaintiff F. in his manner of operating his automobile, negligent in any of the following particulars:

- (a) Did he fail to keep sufficient lookout and sufficient control of his car? A. —.
- (b) Was he operating at an excessive rate of speed? A. —.
- (c) Was he operating on the wrong side of the roadway? A. —.

which conclusions of law may be drawn and judgment rendered. To warrant a judgment the findings constituting the special verdict must be so clear, consistent and complete that the proper judgment can be rendered from the pleadings and the facts found without reference to the evidence disclosed by the record.

In the case cited, it was said that

both forms of verdict submitted in the case were subject to the criticism that they contained statements of evidence, but the foregoing form was found to be legally sufficient to sustain the judgment.

Effective October 4, 1955, the court, when requested by either party, submits in writing each determinative issue to be tried by the jury. Ohio Rev. Code, § 2315.15.

Q. 4. If you answer "Yes" to any of the inquiries in the third question, then answer the corresponding inquiries here following: Was the collision in question a natural result of such negligence of F.,

- (a) In respect to lookout and control? A. —.
- (b) In respect to speed? A. —.
- (c) In respect to being on the wrong side of the roadway? A. —.

Q. 5. If by your answers to the preceding questions you find that both the defendant S. and the plaintiff F. by negligence contributed to produce the collision, then answer this: What proportion of all of the negligence which produced the collision is attributable to the plaintiff F.? A. —.

Q. 6. What amount of damages did the plaintiff F. sustain by reason of the collision? A. \$—.

Q. 7. What amount of damages did the defendant S. sustain by reason of the collision? A. \$—.

All answers agreed to by all jurors, except —.

Dated this — day of —, 19—.

\_\_\_\_\_,  
Foreman.<sup>4</sup>

### § 508. Pedestrian injured at street crossing.

We, the jury, for our special verdict answer the questions submitted as follows:

Q. 1. Did the collision between the plaintiff and the automobile of the defendant H., on December —, 19—, occur at the intersection of Scott and Third Streets? A. —.

Q. 2. At the time of said collision was the defendant H., in the operation of his automobile, negligent in respect to keeping a proper lookout for pedestrians? A. —.

Q. 3. If you answer "Yes" to the second question, then answer this: Was such negligence on the part of the defendant H. a natural cause of injury to the plaintiff? A. —.

Q. 4. Was the plaintiff H. at and immediately before the collision negligent in respect to keeping a proper lookout for his own safety? A. —.

<sup>4</sup> Ford v. Stevenson, Circuit Court,  
Lincoln County, Wisconsin.

Q. 5. If you answer the fourth question "Yes," then answer this: Was such negligence on the part of the plaintiff a cause contributing to his own injury? A. —.

Q. 6. What is the total amount of damages suffered by the plaintiff as a natural result of such collision? A. \$—.

Q. 7. If you find that both the plaintiff and the defendant H., by negligence contributed to cause the collision, then answer this: What proportion of such negligence is attributable to the plaintiff? A. —.

All answers agreed to by all jurors, except —.

Dated this — day of —, 19—.

\_\_\_\_\_,  
Foreman.<sup>5</sup>

**§ 509. Pedestrian on country concrete road killed by automobile in night-time.**

We, the jury, for our special verdict answer the questions submitted as follows:

Q. 1. At the time of the collision between the automobile of the defendant S. and the person of the deceased, F. F., on April —, 19—, was the defendant S. in his manner of operating his automobile negligent in any of the following particulars:

- (a) Was he operating at an excessive rate of speed?  
A. —.
- (b) Did he fail to maintain a sufficient lookout and control of his car? A. —.

Q. 2. If you answer "Yes" to either or both of the inquiries in the first question, then answer the corresponding inquiries here following: Was the collision in question a natural result of negligence on the part of the defendant,

- (a) In respect to his rate of speed? A. —.
- (b) In respect to his lookout and control? A. —.

Q. 3. At the time of said collision was the deceased, F. F., negligent for his own safety in any of the following particulars:

- (a) Did he fail to keep sufficient lookout? A. —.

<sup>5</sup> Hunt v. Haselton, Circuit Court,  
Marathon County, Wisconsin.



- (b) Did he negligently omit to step off the traveled roadway on the approach of the defendant's automobile?  
A. —.

Q. 4. If the answer is "Yes" to either or both of the inquiries contained in the third question, then answer the corresponding inquiries here following: Was the collision in question a natural result of negligence on the part of the deceased,

- (a) In respect to insufficient lookout? A. —.  
(b) In respect to omitting to step off of the traveled roadway? A. —.

Q. 5. In case by your answers you find the defendant by negligence on his part caused or contributed to cause the collision, then answer this: What proportion of the total negligence which caused the death of F. F. is attributable to F. F.?  
A. —.

Q. 6. What amount of damages do you assess in favor of the widow of F. F.,

- (a) As a fair and just compensation for her pecuniary injury resulting from her husband's death? A. \$——.  
(b) For loss of society and companionship of her husband? A. \$——.

Q. 7. What amount of damages was suffered by the estate of F. F. by reason of his death? A. \$——.

All answers agreed to by all jurors, except ———.

Dated this — day of ———, 19—.

\_\_\_\_\_,  
Foreman. <sup>6</sup>

**§ 510. Collision of one automobile with rear of another automobile which was about to turn off roadway.**

We, the jury, for our special verdict answer the questions submitted as follows:

Q. 1. At the time of the collision, on October —, 19—, between the automobiles of the plaintiff and of F., was the defendant F., in his manner of operating his automobile, negligent in any of the following particulars:

<sup>6</sup> Funk v. Siebold, Circuit Court,  
Marathon County, Wisconsin.

- (a) In respect to his rate of speed? A. —.
- (b) In respect to his lookout and control of his automobile? A. —.
- (c) In omitting to give a signal of his approach? A. —.
- (d) In respect to following the plaintiff's car too closely? A. —.

Q. 2. If you answer "Yes" to any of the inquiries in the first question, then answer the corresponding inquiries here following: Was the collision a natural result of such negligence:

- (a) In respect to his rate of speed? A. —.
- (b) In respect to lookout and control? A. —.
- (c) In respect to omitting a signal? A. —.
- (d) In respect to following the plaintiff's car too closely? A. —.

Q. 3. At the time of said collision was the plaintiff G., in his manner of operating his automobile, negligent in any of the following particulars:

- (a) In respect to lookout and control of his automobile? A. —.
- (b) In respect to signaling his intention to turn to the right? A. —.
- (c) In respect to operating to the left of the middle of the roadway? A. —.

Q. 4. If you answer "Yes" to any of the inquiries in the third question, then answer the corresponding inquiries here following: Was the said collision a natural result of such negligence on the part of the plaintiff:

- (a) In respect to lookout and control of his automobile? A. —.
- (b) In respect to signaling his intention to turn to the right? A. —.
- (c) In respect to operating to the left of the middle of the roadway? A. —.

Q. 5. In case by your answers to the preceding questions you find that both the plaintiff G. and the defendant F., by negligent operation of their respective automobiles, contributed to produce the collision, then answer this: What proportion of all of the negligence producing the collision is attributable to the plaintiff? A. —.

Q. 6. What sum would be required to reasonably compensate the plaintiff for his damages,

- (a) To his automobile? A. \$——.
- (b) For necessary expenses to relieve himself of his injuries? A. \$——.
- (c) For injuries to his person? A. \$——.

All answers agreed to by all jurors except \_\_\_\_\_.

Dated this \_\_\_\_ day of \_\_\_\_\_, 19—.

\_\_\_\_\_,  
Foreman. <sup>7</sup>

**§ 511. Defendant's automobile disabled and left standing without lights on concrete roadway.**

We, the jury, for our special verdict answer the questions submitted as follows:

Q. 1. At the time when the plaintiff E.'s automobile collided with the defendant B.'s automobile, on August —, 19—, was the defendant B. negligent in any of the following particulars:

- (a) In failing to have any light on his automobile at the time of the collision? A. —.
- (b) In continuing to operate his automobile up to the time when his lights went out and his car was wholly disabled? A. —.

Q. 2. If you answer "Yes" to either or both inquiries in the first question, then answer the corresponding inquiry here following: Was the said collision a natural result of negligence on the part of the defendant B.,

- (a) In failing to have any light on his automobile at the time of the collision? A. —.
- (b) In continuing to operate his automobile up to the time when his lights went out and his car was wholly disabled? A. —.

Q. 3. At the time of said collision was the plaintiff, E., in his manner of operating his automobile, negligent in any of the following particulars:

- (a) In respect to keeping sufficient lookout ahead and control of his car? A. —.

<sup>7</sup> Guth v. Fisher, Circuit Court,  
Oneida County, Wisconsin.

(b) In respect to his rate of speed? A. —.

Q. 4. If you answer "Yes" to either or both of the inquiries in the third question, then answer the corresponding inquiry here following: Was the collision in question a natural result of negligence of the plaintiff E.,

(a) In respect to keeping sufficient lookout ahead and control of his car? A. —.

(b) In respect to his rate of speed? A. —.

Q. 5. What was the total amount of damages suffered by the plaintiff E. as the natural result of such collision? A. \$—.

Q. 6. If you find that the plaintiff E. by negligence on his part contributed to produce his own injuries, then answer this: What proportion of the total negligence which together produced the damages to the plaintiff is attributable to him? A. —.

All answers agreed to by all jurors, except —.

Dated this — day of —, 19—.

\_\_\_\_\_,  
Foreman.<sup>8</sup>

**§ 512. Collision of bus with automobile resulting in injury to several plaintiffs by causing one automobile to collide with another automobile.**

We, the jury, for our special verdict answer the questions submitted as follows:

Q. 1. On April —, 19—, at the time of the collision between the P. and M. automobiles, was the defendant W. negligent in his manner of operating his automobile bus in any of the following particulars:

(a) In respect to rate of speed? A. —.

(b) In respect to lookout and control of his bus? A. —.

(c) In respect to his manner of passing the M. automobile? A. —.

Q. 2. If you answer "Yes" to any of the inquiries contained in the first question, then answer the corresponding inquiries here following: Was the collision between the M. and P. automobiles a natural result of negligence on the part of W.,

<sup>8</sup> Engebrecht v. Bradley, Circuit Court, Marathon County, Wisconsin.

- (a) In respect to rate of speed? A. —.
- (b) In respect to lookout and control of his bus? A. —.
- (c) In respect to his manner of passing the M. automobile? A. —.

Q. 3. At the time of said collision was the plaintiff D. M. negligent in respect to keeping lookout and sufficient control of her automobile? A. —.

Q. 4. If you answer the third question "Yes," then answer this: Was the collision in question a natural result of such negligence on the part of D. M.? A. —.

Q. 5. At the time of the collision was the plaintiff W. P. negligent in respect to keeping lookout and sufficient control of his automobile? A. —.

Q. 6. If you answer the fifth question "Yes," then answer this: Was the collision a natural result of such negligence on the part of W. P.? A. —.

Q. 7. What amount of damages was suffered by W. P. as a natural result of the collision in question? A. \$—.

Q. 8. What amount of damages was suffered by M. P. as a natural result of the collision in question? A. \$—.

Q. 9. What amount of damages was suffered by E. O. as a natural result of the collision in question? A. \$—.

Q. 10. What amount of damages was suffered by B. O. as a natural result of the collision in question? A. \$—.

Q. 11. What amount of damages was suffered by N. M. as a natural result of the collision in question? A. \$—.

Q. 12. What amount of damages was suffered by J. M. as a natural result of the collision in question? A. \$—.

Q. 13. What amount of damages was suffered by D. M. as a natural result of the collision in question? A. \$—.

All answers agreed to by all jurors, except —.

Dated this — day of —, 19—.

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Foreman. <sup>9</sup>

<sup>9</sup> Walter Polzin, Mabel Polzin,  
Emmet Olson, Beatrice Olson,  
Naomi Maney, and Drusilla Maney

v. Wachtl, Circuit Court, Marathon  
County, Wisconsin.

**§ 513. Truck wrecked by leaving roadway and striking tree; resulting death of alternate driver of truck who was asleep.**

We, the jury, for our special verdict answer the questions submitted as follows:

Q. 1. On or about May —, 19—, at the time when the truck in question left the concrete road and struck a tree just before the death of G. B., was the defendant J. negligent in attempting to turn the pet-cock or switch on the gasoline line to the reserve tanks while operating the truck at the rate of speed at which he was operating it? A. —.

Q. 2. If you answer "Yes" to the first question, then answer this: Was the death of G. B. a natural result of such negligence on the part of J.? A. —.

Q. 3. At the time in question was the deceased, G. B., negligent in respect to his own safety in either of the following particulars:

- (a) In undertaking the trip with the understanding that he and the defendant J. were to alternate in operating the truck and in each sleeping while the other was operating? A. —.
- (b) In going to sleep immediately before the accident and thereby entrusting the operation of the truck entirely to the defendant J.? A. —.

Q. 4. If you answer "Yes" to either or both of the inquiries in the third question, then answer the corresponding inquiry here following: Was the death of G. B. caused naturally, in whole or in part, by negligence of said G. B.,

- (a) In undertaking the trip with the understanding that he and the defendant J. were to alternate in operating the truck and in each sleeping while the other was operating? A. —.
- (b) In going to sleep immediately before the accident and thereby entrusting the operation of the truck entirely to the defendant J.? A. —.

Q. 5. What amount of damages did the widow, E. B., suffer by reason of the death of her husband? A. \$—.

All answers agreed to by all jurors, except \_\_\_\_\_.

Dated this — day of \_\_\_\_\_, 19—.

\_\_\_\_\_,  
Foreman.<sup>10</sup>

<sup>10</sup> Bernard v. Jennings, Circuit Court, Marathon County, Wisconsin.

**§ 514. Collision between two trucks, causing death of driver of one of them.**

We, the jury in this case, by the concurrence of nine or more of our number, as shown by those signing below, do find the facts in this case, by the greater weight of the evidence, as follows:

On February —, 19—, about 3:30 o'clock a. m. there was a collision between two trucking outfits on State Highway No. 42 a short distance north of the city of M———, Ohio, as a result of which M. H. H., the plaintiff's decedent, was killed.

One of the trucking outfits, consisting of a tractor and one trailer, was driven by said M. H. H., and was traveling on said highway No. 42 in a northerly direction. Said highway No. 42 runs in a north and south direction; it is about 31 feet in width of the improved portion, which is divided into three lanes of traffic at the place of the accident, which lanes are marked by painted lines on the roadway and each lane is about ten feet in width. The lane on the west side of said highway is for south moving traffic; the lane on the east side is for north moving traffic, and there is a center lane.

At the time of the collision, there was a coating of ice over the improved portion of the roadway. The trucking outfit of the defendant consisted of a tractor and two trailers, was being driven by J. F., an employee of the defendant, he then being engaged upon the business of the defendant, and said trucking outfit was being driven in a southerly direction on said highway No. 42.

The plaintiff has not proven that the defendant's tractor or trailers were being operated on the wrong side of the road at the time of the collision with the tractor and trailer being driven by Mr. M. H. H., the decedent.<sup>11</sup>

<sup>11</sup> Hubbard v. Cleveland, C. & C. Highway, Inc., 81 OhApp 445, 37 OhOp 279, 76 NE2d 721 [motion to certify overruled, 1-2-48], affirming judgment for defendant entered on the special verdict.

In the case cited, it was held that the "wrong side of the road," as used in this verdict, referred to the east lane of traffic, and was suf-

ficiently definite, since the parties had frequently employed that term throughout the trial. The claim of negligence on the part of defendant's driver was that he had crossed to the easterly lane of traffic on which the decedent was driving, and was therefore on the "wrong side of the road."

**CHAPTER 12B**  
**INTERROGATORIES TO JURY <sup>1</sup>**

**Section**

515 - 519. (Reserved).  
520. Answer of no evidence.  
521. Passenger injured.  
522. Action for personal injuries.  
523. Action for wrongful death.

**Section**

524. Automobile caught in street-car tracks.  
525. Boy riding bicycle killed by truck.

**§§ 515-519. (Reserved).**

**§ 520. Answer of no evidence.**

Q. How fast was the P——— automobile going as it approached 42nd Avenue?

A. No evidence.<sup>2</sup>

**§ 521. Passenger injured.**

Automobile collided with freight car which was being pushed by electric locomotive on defendant's street railway. Plaintiff, a passenger in the automobile, was injured.

Q. 1. For what distance was the automobile in which plaintiff was riding driven on the street car track before it collided with the box car? A. — feet.

Q. 2. What was the greatest depth of the groove on the side of the north rail from the center of Buckley Street to the point where the collision occurred? A. — inches.

Q. 3. Were there any lighted lanterns on the front end of the box car at the time of and immediately before the collision occurred? A. —.

Q. 4. If you answer question No. 3 "yes," how many lanterns were there and what color of light did they show? A. — red and — white.

Q. 5. If you answer question No. 3 "yes," for what distance could these lights have been seen by the plaintiff had she been looking? A. — feet.

<sup>1</sup> See §§ 111, 112, 161, 181, Volume I.

<sup>2</sup> Superior Meat Products, Inc. v. Holloway, 113 IndApp 320, 48 NE2d 83.

It was held that the foregoing

answer to the interrogatory was not evasive and improper, but amounts to a finding against the party having the burden of proving the fact inquired about.



Q. 6. If you find for the plaintiff and against the U. E. R. Company, in what respect was the railway company negligent? A. Irregularity of rail and track bed.

Q. 7. Was W. T. (employee of the defendant railway company) riding at or immediately near the front end of the box car at the time of and immediately before the collision? A. —.

Q. 8. What if anything did the plaintiff do or say to the driver of the automobile in which she was riding to warn him of the approaching cars of the railway company? A. Nothing.

Q. 9. If you find for the plaintiff and against the city of Coffeyville, in what respect was the city negligent? A. City was not negligent.

Q. 10. If plaintiff had been looking in the direction of the approaching railway cars could she have seen them when the automobile in which she was riding was — feet from the railway cars? A. —.

Q. 11. Was the defendant the U. E. R. Company negligent:

(a) In that the street between the rails was defective and unsafe at the place where the collision occurred? A. —.

(b) In that it failed to have lights on the box car being pushed towards the automobile in which the plaintiff was riding? A. —.

Q. 12. Was W. T. (railway employee) riding on the front end of the box car as it was being pushed toward the car in which plaintiff was riding? A. —.

Q. 13. If you answer No. 12 in the affirmative, then state if after W. T. had observed the car in which plaintiff was riding on the street car track, could he by the exercise of ordinary care have stopped the train in time to have avoided a collision? A. —.

Q. 14. Do you find that the plaintiff was guilty of any act of negligence that contributed to her injuries? A. —.

Q. 15. If you answer question No. 14 in the affirmative, then state the act or acts of negligence committed by the plaintiff that contributed to her injuries. A. —.<sup>3</sup>

<sup>3</sup> Slaton v Union Electric R Co, 158 Kan 132, 145 P2d 456

The jury returned a verdict against the plaintiff as to the city of Coffeyville and in favor of the plaintiff as to the railway company. The judgment against the railway company was reversed and final judgment entered in its favor, on

the ground, chiefly, that the answers to the interrogatories did not show any negligence against the railway company, when considered in the light of the pleadings and evidence, and that the pleadings did not warrant the submission of question 13.

**§ 522. Action for personal injuries.**

Action for personal injuries sustained by motorist as result of collision between automobile and interurban car at crossing.

Q. 1. Do you find from the evidence that the whistle on the interurban car was blown as the car approached the crossing in question? A. —.

Q. 2. Do you find from the evidence that in operating said car at said time and place there was on the front end of said car a light or lights turned on or lighted? A. Yes, dim.

Q. 3. If the plaintiff, O. F., had looked westward from his automobile when it was six or eight feet north of the interurban tracks and just before he started to approach the tracks with his automobile, could he have seen the approaching interurban car? A. —.<sup>4</sup>

**§ 523. Action for wrongful death.**

Action for wrongful death of motorist resulting from collision between automobile and interurban car.

Q. 1. If R. O. (deceased motorist) had looked as he approached the track of the C. D. & M. E. Company on Oakland Park Avenue on the morning of April —, 19—, would he have seen the interurban car in time to stop his automobile in a place of safety? A. Yes.

Q. 2. Did R. O. as he approached the track of the C. D. & M. E. Company on Oakland Park Avenue on the morning of April —, 19—, look to the south for an interurban car when he was far enough from the railroad track to stop his automobile before reaching the crossing? A. —.<sup>5</sup>

**§ 524. Automobile caught in streetcar tracks.**

Collision between automobile and streetcar when motorist was unable to turn his car out of streetcar track.

<sup>4</sup> Fox v. Conway, 133 OhSt 273, 10 OhOp 349, 13 NE2d 124, holding the special findings were not inconsistent with a general verdict for plaintiff, and affirming judgment entered on such verdict.

See Ohio Rev. Code, §§ 2315.16, 2315.17, as to special findings of fact.

<sup>5</sup> Columbus, Delaware & Marion Elec. Co. v. O'Day, 123 OhSt 638,

176 NE 569, reversing general verdict in favor of plaintiff and rendering final judgment for defendant, for the reason the special findings were inconsistent with the general verdict and established the fact that decedent was guilty of contributory negligence.

See Ohio Rev. Code, §§ 2315.16, 2315.17, with respect to special findings of fact.

Q. 1 At the instant of the collision what was the speed of the streetcar in miles per hour? A. — miles per hour.

Q. 2 Prior to the collision what was the speed of the automobile as it proceeded west on Fifth Avenue? A. About — miles per hour.

Q. 3 At the instant of the collision, what was the speed of the automobile? A. About — miles per hour.

Q. 4 Did G (motorist) make any effort to leave the track before the collision occurred? A. —.

Q. 5 If your answer to the foregoing question is "yes," then state how far in feet did he proceed from the time he first attempted to leave the tracks until the collision occurred. A. About — feet.

Q. 6 Where was the streetcar with reference to the bend of Sunbury Road when G. first saw the streetcar? A. — feet east of Sunbury Road

Q. 7. How far in feet was G. from the streetcar when he first saw it? A. — to — feet.

Q. 8. How far in feet was the site of the collision from Sunbury Road? A. About — feet.

Q. 9. Prior to the collision, what was the speed of the streetcar in miles per hour as it proceeded east on Fifth Avenue? A. — miles per hour.<sup>6</sup>

#### § 525. Boy riding bicycle killed by truck.

Q. 1 Did the defendant's truck run into G. O. M. (decedent)? A. —.

Q. 2. If you answer the foregoing question in the affirmative, what part of the defendant's truck ran into the deceased? A. —.

Q. 3 Where on the highway were the three boys riding on their bicycles when the defendant's truck came up to and overtook them? A. On shoulder.

Q. 4 Where on the highway was defendant's truck running when it came up to and overtook the three boys riding on their bicycles? A. East side

<sup>6</sup> Gearhart v Columbus R, Power & Light Co, 65 OhApp 225, 18 Oh Op 415, 29 NE2d 621, affirming general verdict and judgment for plaintiff. It was held that the answers to interrogatories 4 and 5 were not

inconsistent with a general verdict for plaintiff

See Ohio Rev Code, §§ 2315 16, 2315 17, as to special findings of fact

Q. 5. What was the distance between the defendant's truck and the boys riding on bicycles when said truck was passing them? A. — feet.

Q. 6. Did the defendant's truck run over the body of G. O. M.? A. —.

Q. 7. If you should answer the foregoing question in the affirmative, then state which wheel or wheels of the defendant's truck ran over the body of G. O. M. A. —.

Q. 8. At the time the front end or cab of defendant's truck overtook and passed said G. O. M. riding along the east side of the highway on his bicycle and so long as he was in plain sight of the driver thereof:

(a) Was the deceased riding off the pavement slab and on the shoulder of the road? A. —.

(b) Was he having any apparent trouble or difficulty riding his bicycle? A. —.

(c) Did he later have trouble or difficulty in managing his bicycle before defendant's truck had completely passed him? A. —

(d) If you answer the foregoing question (c) in the affirmative, state what occurred. A. Hit a rough spot.

Q. 9. If you return a verdict in favor of the plaintiffs, then state specifically of what act or acts of negligence you find the defendants or any of them to be guilty. A. —.

Q. 10. Was the deceased, G. O. M., thrown off his bicycle? A. —.

Q. 11. If you answer the foregoing question in the affirmative, then state what caused him to be thrown off his bicycle. A. Hit a rough spot.

Q. 12. Did the plaintiffs' nine-year-old son, G. O. M., possess sufficient skill and experience to safely ride his bicycle on Highway U. S. No. — at the time and place where his death occurred? A. —.

Q. 13. If you answer the foregoing question in the affirmative, then state whether or not the deceased, G. O. M., rode and managed his bicycle, at the place and time of his injury, and under all the circumstances disclosed by the evidence here, in a careful and prudent manner and with due regard to his own safety. A. —.<sup>7</sup>

<sup>7</sup> Morrison v Hawkeye Casualty Co, 168 Kan 303, 212 P2d 633  
The case cited was an action by

the parents to recover for the wrongful death of their nine-year-old son, who was killed while rid-

ing a bicycle on the highway at a time when the boy and two others were being overtaken and passed by a truck. The owner and driver of the truck and the insurer thereof were all named as defendants. Judgment on verdict against all defendants was affirmed.

The paved portion or slab of the highway was 18 feet wide with 18 inches of shoulder on each side. While overtaking and passing the boys the driver of the truck had a clear view for several hundred feet. The truck passed a vehicle approaching from the opposite direc-

tion a few feet to the rear of the boys, who had turned off the paved slab and were riding on the shoulder. There was evidence that the truck proceeded straight down the highway, without turning out, with a clearance of 3 to 3½ feet from the boys as it passed them. The deceased boy hit a hole or rough spot on the shoulder and fell from his bicycle toward the truck, his head or shoulders probably colliding with the truck. The interrogatories were not inconsistent with the verdict.

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1982


CUMULATIVE SUPPLEMENT

REID'S BRANSON

INSTRUCTIONS  
TO JURIES

IN CIVIL AND CRIMINAL  
CASES

CONTAINING SELECTED INSTRUCTIONS AND  
CITATIONS FROM VARIOUS JURISDICTIONS

By   
JAMES K. WEEKS  
Professor of Law  
Syracuse University College of Law

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This preface is intended to alert readers of these volumes to some of the new features in the 1982 Cumulative Supplement.

Instead of providing verbatim examples of jury charges, this edition of *Reid's* *Johnson* Cumulative Supplement takes a unique and useful approach. Reasons for correct jury instructions are enumerated and examples of incorrect charges and their defects are provided for comparison. Where appropriate, the applicable law of the jurisdiction is briefly stated.

I am most grateful to my Research Assistant, R. Scott McGrew, who devoted countless hours to the preparation of this edition, and whose ideas contributed much to the expanded scope of these volumes.

There are many new section headings and cross-indexing references that would further increase the usefulness of these volumes. In addition, citations to State Reporters are given when available.

James K. Weeks

Albany, New York  
April 1982



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# FORMS OF INSTRUCTIONS TO JURIES

## MOTOR VEHICLES

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#### MANUFACTURERS, DEALERS, SALES AGENCIES, GARAGES, AND FILLING STATIONS

##### Section

305. Rights of ultimate purchaser against  
manufacturer.

#### § 305. Rights of ultimate purchaser against manufacturer.

##### Arkansas.

If you find from a preponderance of the evidence in the case that a defect existing during the manufacturing or assembly process by defendant, Ford Motor Company, was the proximate cause of the upset of this vehicle and the resulting injuries and damages, if any, to the plaintiff, and if you further find that the exercise of reasonable care by defendant, Ford Motor Company, would have avoided the placing of this vehicle in the channels of trade with such a defect, if any, then you may find that the failure of defendant, Ford Motor Company, to discover and correct the defect, if any, constitutes negligence.<sup>16</sup>

<sup>16</sup> Ford Motor Co. v. Fish, 233 Ark 639, 346  
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**§ 320. Liability from operation generally.****Florida.**

When there was evidence that there had been a collision between a minibike, which had stopped at an intersection and had then made a right-hand turn, and a tractor trailer, which also had made a right-hand turn at the intersection and in so doing had "side-swiped" the plaintiff riding on the minibike, the following instruction was not error and did not invade the fact finding province of the jury:

"The court has determined, and now instructs you as a matter of law that the circumstances at the time and place of the incident complained of were such that the Defendant, LLOYD LEE JACKSON, had a duty to use reasonable care for ROBERT REARDEN'S safety."<sup>1,1</sup>

**Oklahoma.**

You are instructed that all persons operating motor vehicles on the highways or elsewhere owe to the public and other vehicles and pedestrians the duty of controlling and driving such motor vehicles carefully and to use due care and to avoid causing an accident, and in the performance of that duty they are bound to take all reasonable caution which ordinarily prudent persons usually exercise under the same or similar conditions.<sup>3 1</sup>

<sup>1,1</sup> Jackson v. Reardon, 392 S2d 956 (FlaDistApp 1981).

<sup>3,1</sup> Peter Kiewit Sons' Co. v. Grimme (Okla), 469 P2d 1007 (1970).

**§ 321. —Liability is based on proof of negligence.****California.**

Despite the criticism of the "but for" language used in the standard proximate cause jury instruction, the trial judge is allowed to exercise his or her discretion in selecting a preference between the standard proximate cause instruction or the legal cause instruction.<sup>8 1</sup>

It is generally agreed that the "but for" proximate cause instruction is inapplicable where the claim is that two independent causes have concurred to bring about an event, either of which, when operating alone, would have been sufficient to cause the result.<sup>8 2</sup>

**Colorado.**

The Colorado comparative negligence statute, Colorado Revised Statutes, § 13-21-111(1) (1973 & Supp. 1981), eliminates the fourth element of the *res ipsa loquitur* doctrine — requirement that the plaintiff be free from contributory negligence — and modifies the second element of the *res ipsa* doctrine — the requirement there be a finding that it is more likely than not the defendant's negligence was the cause of the accident rather than any conduct on the part of the plaintiff. Therefore, "whenever a court can reason-

ably find that the event is of the kind which ordinarily would not occur in the absence of someone's negligence and that defendant's inferred negligence was, more probably than not, a cause of the injury, the doctrine of *res ipsa loquitur* applies even though plaintiff's negligent acts or omissions may also have contributed to the injury. Once the trial court rules that the doctrine is applicable, the jury must then compare any evidence of negligence of the plaintiff with the inferred negligence of the defendant and decide what percentage of negligence is attributable to each party."<sup>9 1</sup>

#### District of Columbia.

In an action for sexual assault of a minor against several defendants including the District of Columbia, the trial court's addition of the "substantial factor" test in its jury instructions on proximate cause was improper. The plaintiffs had to meet a greater burden than that ordinarily required by law to hold a defendant liable for his negligence. This amounted to reversible error.<sup>10 1</sup>

#### Florida.

Negligence is a legal cause of loss, injury or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred.<sup>11</sup>

#### Indiana.

If after considering all of the evidence in this case you are unable to determine whose fault or omission occasioned the collision of the automobile of the plaintiff and the automobile of the defendant, then your verdict should be for the defendant.<sup>16 1</sup>

The law does not presume that the defendant was negligent as charged in plaintiff's complaint, and mere proof that the decedent died of injuries received in an automobile accident is not of itself alone sufficient to establish liability on the part of the defendant. In order to recover against the defendant in this action, the plaintiff must go further and prove by a fair preponderance of all the evidence that the defendant was negligent as charged in the complaint and that such alleged negligence proximately caused the death of plaintiff's decedent; provided, further, that the plaintiff's decedent was free from any negligence contributing to the accident and her death.<sup>16 2</sup>

#### Iowa.

The mere fact that an accident happened at the time and place charged in the pleadings does not establish nor does it raise a presumption that the defendant was negligent. Before the plaintiff can recover against defendants upon his petition, the negligence of the defendants must be proven by the evidence.<sup>17.1</sup>

You are instructed that it is not necessary that the plaintiff prove the defendant guilty of each separate charge of negligence alleged in the petition. It will be sufficient to entitle plaintiff to recover if you find from a fair preponderance of all the evidence that the defendant was guilty of any one of such acts of negligence.<sup>17 2</sup>

**Missouri.**

The court instructs the jury that the mere fact standing alone that there was an accident at the place mentioned in evidence does not in and of itself entitle plaintiff to a verdict, but the plaintiff must prove by a preponderance of the evidence that defendant was negligent in the respects set out in other instructions. Negligence is not in law presumed, but must be established by proof as explained in other instructions. Neither are you permitted to base a verdict entirely and exclusively on mere surmise, guesswork and speculation; and if upon the whole evidence in the case, fairly considered, you are not able to make a finding that defendant was negligent without resorting to surmise, guesswork and speculation outside of and beyond the scope of the evidence, and the reasonable inferences deductible therefrom, then it is your duty to, and you must return a verdict for the defendant.<sup>24 1</sup>

The court instructs the jury that the mere fact of itself that plaintiff was injured and has brought suit claiming that defendant, C. M., was negligent is no evidence whatever that defendant was in fact negligent. Negligence is not in law presumed, but must be established by proof as explained in other instructions.<sup>24 2</sup>

**Nebraska.**

In respect to a motorist entering a favored street from a nonfavored one, it is for the jury to decide under all the circumstances involved, whether defendant was negligent in this regard.<sup>25.1</sup>

**Ohio.**

The court says to you, Members of the Jury, that there is no presumption in law that the defendant was negligent. The presumption is, before any evidence was introduced, that the defendant was at all times complained of by plaintiff in her petition in the exercise of ordinary care; the court further charges you that you cannot presume that defendant was negligent from the mere fact that there was an accident. Negligence is a fact which must be proven against the defendant by the greater weight of all the evidence and is not to be presumed nor guessed at.<sup>29 1</sup>

**Oklahoma.**

The mere proof of an accident or injury carries with it no presumption of negligence, but the burden of proof rests upon the party alleging negligence to establish the same by a preponderance of the evidence, and likewise it is incumbent upon such party to show that the said negligence thus established



was the proximate cause of the injury and damage, if any received by the party alleging same.<sup>30 1</sup>

#### Rhode Island.

It is harmless error for a court to charge that if the incident was a "mere accident" the jury should return a verdict for the defendant, where the court had given clear instructions on issues of negligence, proximate cause and the pertinent law to be applied to the facts of the case.<sup>31 1</sup>

#### Washington.

You are instructed that it is the primary duty of the driver approaching from the rear to avoid a collision, and, in absence of an emergency or unusual conditions, the driver to the rear is negligent if he runs into the car ahead of him. The driver to the rear is not necessarily excused even in the event of an emergency, for it is his duty to keep such lookout and observation of the vehicle ahead, so that he can stop his vehicle without collision. However, the following driver is not negligent simply because he collides with a vehicle in front of him.<sup>35 1</sup>

#### Wisconsin.

In answering these questions, you will weigh and consider the credible evidence, including the reasonable inferences from the evidence, bearing on these inquiries, in the light of the instructions I will now give you pertaining to specific duties, statutory rules of the road, and rules of law that are to be applied by you in determining what your answers to these questions should be.<sup>36 1</sup>

<sup>8.1</sup> Fraijo v. Hartland Hospital, 99 CalApp3d 344, 160 CalRptr 246 (1979).

<sup>8.2</sup> Fraijo v. Hartland Hospital, 99 CalApp3d 344, 160 CalRptr 246 (1979).

<sup>9.1</sup> Montgomery Elevator Co. v. Gordon, 619 P2d 66 (Colo 1980).

<sup>10.1</sup> Lacy v. District of Columbia, 408 A2d 985 (DCApp 1979).

<sup>11.1</sup> Florida East Coast Ry. Co. v. McKinney (Fla), 227 So2d 99 (1969).

<sup>12.1</sup> Keck v. Pozorski, 135 IndApp 192, 1 IndDec 561, 191 NE2d 325 (1963).

<sup>12.2</sup> Shelby Nat. Bank v. Miller, 147 IndApp 203, 21 IndDec 675, 259 NE2d 450 (1970).

<sup>17.1</sup> Pinckney v. Watkinson, 254 Ia 144, 116 NW2d 258 (1962).

<sup>17.2</sup> McCoy v. Miller, 257 Ia 1151, 136 NW2d

332 (1965).

<sup>24.1</sup> Baccaro v. Nicolosi (Mo), 332 SW2d 854 (1960).

<sup>24.2</sup> Smith v. Middlekauff (Mo), 359 SW2d 755 (1962).

<sup>25 1</sup> Hellmeier v. Policky, 178 Neb 170, 132 NW2d 760 (1965).

<sup>29.1</sup> Phillips v. Barker, 87 OLA 393, 180 NE2d 180 (1959).

<sup>30.1</sup> Peter Kiewit Sons' Co. v. Grimme (Ok), 469 P2d 1007 (1970).

<sup>31.1</sup> Camaras v. Moran, 100 RI 717, 219 A2d 487 (1966).

<sup>35 1</sup> Vangemert v. McCalmon, 68 Wash2d 618, 414 P2d 617 (1966).

<sup>36 1</sup> Fink v. Reitz, 28 Wis2d 319, 137 NW2d 21 (1965).

### § 322. —Definitions of unavoidable accident.

#### Florida.

The doctrine of sudden emergency like that of unavoidable accident is an ultimate conclusion of fact, and for either or both to be given there must be

sufficient facts relating to the application of these doctrines. If a factual situation exists which leads one to the conclusion of sudden emergency, it may follow that an unavoidable accident may result. Yet, an unavoidable accident can occur without a sudden emergency.<sup>39 1</sup>

#### Georgia.

(1) I charge you the defendant contends as one of his defenses that the plaintiff's child's injuries occurred as a result of an accident, as far as the defendant is concerned. The word "accident" has two or more separate and distinct meanings. As used in connection with this case, it does not have the meaning which the word has to the average layman. In Georgia law, it generally means in connection with personal injury cases such as this, an injury which occurred without being caused by either the negligence of the plaintiff or of the negligence of the defendant. The idea of accident excludes responsibility for the cause of the injury.

If you find from a preponderance of the evidence in this case that the plaintiff's child's injuries, if any, were caused by accident, as I have defined the word, insofar as the defendant is concerned, that is, it occurred without any lack of ordinary care and diligence on the part of the defendant, then the plaintiff could not recover from the defendant in this case.<sup>39 2</sup>

(2) Now, Gentlemen, I charge you further that the defendants contend as one of their defenses that plaintiff's complaint occurred as the result of an accident. In Georgia law an accident means, in connection with personal injury cases such as this, that injury which occurs without being caused by the negligence either of the plaintiff, or of the defendant. The idea of accident excludes responsibility for the cause of the injury. If you find from the preponderance of evidence that the plaintiff's injuries and damages, if any, were caused by accident as I have defined the word — that is, it occurred without any lack of ordinary care and diligence on the part of the plaintiffs or the defendants, then the plaintiffs cannot recover damages. I further charge you that the mere fact that the plaintiffs were injured or suffered damages without cause on the plaintiffs' part does not authorize a recovery, for it is the negligence of the defendant in a tort action that authorizes the recovery of damages by the plaintiff and not merely the injury, for if neither party is negligent, the occurrence is an accident in the eyes of the law and no recovery is authorized in such cases.<sup>39 3</sup>

#### Idaho.

Negligence is never presumed, but must be proven, and it is possible, under the laws of this state, for an accident to occur without wrongful acts on the part of either plaintiff or defendant.

Such a collision comes under the heading of an unavoidable accident, and if you find that neither plaintiff nor the driver of any other car who is a party to this action was guilty of such wrongful conduct as would constitute negligence in this case, then I instruct you that the accident would be an unavoidable one for which no one would be responsible.<sup>39 4</sup>

**Indiana.**

The law of this state recognizes the possibility of a mere accident; that is, an occurrence which is in no way due to the conscious act or fault of anyone. The happening of a mere accident resulting in injury or death cannot support a verdict for damages. Therefore, if you find that the death of L.E.S. in this case was the result of a mere accident, there can be no recovery for the plaintiff.<sup>40 1</sup>

**Nebraska.**

It is proper to submit to the jury an instruction on the sudden emergency doctrine when there is evidence that: (1) an emergency existed; (2) the party seeking to invoke the doctrine to his benefit did not cause or contribute to the emergency; and (3) he used due care to avoid the accident.<sup>40 2</sup>

**New Mexico.**

"Unavoidable accident" is defined as an accident which is not occasioned in any degree, either directly or remotely, by want of such care or prudence as the law holds every man bound to exercise. You are, therefore, further instructed that if, after full consideration of all the evidence, you believe that the plaintiff's alleged accident was caused by an unavoidable accident then there can be no recovery in this action and your verdict must be for the defendant.<sup>41 1</sup>

**South Dakota.**

Giving the unavoidable accident instruction is only proper when there is evidence that something other than the negligence of one of the parties may have been the cause of the accident, especially when the element of surprise is evident.<sup>43.1</sup>

<sup>39.1</sup> Scott v. Barfield (Fla), 202 So2d 590 (1967).

<sup>39.2</sup> Brewer v. Gittings, 102 GaApp 367, 116 SE2d 500 (1960).

<sup>39.3</sup> Broome v. Matthews, 102 GaApp 481, 116 SE2d 662 (1960).

<sup>39.4</sup> Morford v. Brown, 85 Idaho 480, 381 P2d 45 (1963).

<sup>40.1</sup> Shane v. Fields, 135 IndApp 393, 1 IndDec 379, 190 NE2d 195 (1963).

<sup>40.2</sup> Maurer v. Harper, 300 NW2d 191 (Neb 1980).

<sup>41.1</sup> Williams v. Burke, 68 NM 35, 357 P2d 1087 (1960)

<sup>43.1</sup> Plucker v. Kappler, 311 NW2d 924 (SD 1981).

**§ 324. —Inference of negligence from proof of collision and resulting injury; res ipsa loquitur.**

**Colorado.**

The Colorado comparative negligence statute, Colorado Revised Statutes, § 13-21-111(1) (1973 & Supp. 1981), eliminates the fourth element of the res ipsa loquitur doctrine — requirement that the plaintiff be free from contributory negligence — and modifies the second element of the res ipsa doctrine — the requirement there be a finding that it is more likely than not

the defendant's negligence was the cause of the accident rather than any conduct on the part of the plaintiff. Therefore, "whenever a court can reasonably find that the event is of the kind which ordinarily would not occur in the absence of someone's negligence and that defendant's inferred negligence was, more probably than not, a cause of the injury, the doctrine of *res ipsa loquitur* applies even though plaintiff's negligent acts or omissions may also have contributed to the injury. Once the trial court rules that the doctrine is applicable, the jury must then compare any evidence of negligence of the plaintiff with the inferred negligence of the defendant and decide what percentage of negligence is attributable to each party."<sup>52 1</sup>

#### Kentucky.

To invoke the doctrine of *res ipsa loquitur*, three essential elements must be met: (1) the instrumentality must be under the control or management of the defendant; (2) the circumstances according to common knowledge and experience, must create a clear inference that the accident would not have happened if the defendant had not been negligent; and (3) the plaintiff's injury must have resulted from the accident.<sup>55.1</sup>

#### Minnesota.

Now, when an accident is such that it would not ordinarily have happened unless someone was negligent, and if the thing which caused the accident is shown to have been under the exclusive control of the defendant, that is, the \_\_\_\_\_ Corporation, at a time which I will discuss with you a moment later, then you are permitted to infer from the mere fact that the accident happened and the circumstances surrounding it that the defendant was negligent.

Before you are permitted to make this inference, you must find, first, that the plaintiff suffered injuries to, in this case, his person; and second, that the accident was of a kind which ordinarily does not happen unless someone is negligent; and third, that the car in this case was in the exclusive control of the defendant, that is, the \_\_\_\_\_ Corporation, at the time that the negligent act, if any, must have happened. This will be the sort of act that will be defined for you at a little greater length later on in these instructions. And fourth, that if the car in this case passes from the \_\_\_\_\_'s control, that its condition was not changed by any improper use or handling on the part of Mr. B. or anyone else. And fifth, that the injury or the condition resulting in the injury was not due to the conduct of the plaintiff or some third person.

If you should find that Mr. B. has established all of the above, then you are permitted but you are not required to draw an inference that the \_\_\_\_\_ Corporation was negligent.

When I say that you must find that control was in the defendant, that is, the \_\_\_\_\_ Corporation in this case, it is sufficient if you find that the defendant had, at the appropriate time, the right of control and the opportunity to exercise it over this car, which is involved in this particular lawsuit.<sup>58 1</sup>

**Missouri.**

If you find that defendants while in control of and pulling said cart caused and permitted said cart to suddenly leave its accustomed path of travel, swing out, and strike the plaintiff as it was being pulled past the plaintiff, if you so find, then you are instructed that such facts (if you believe them to be true) are sufficient circumstantial evidence to warrant a finding by you that the defendants were negligent, and you may so find, unless you find and believe from other facts and circumstances in evidence that the occurrence was not due to the defendants' negligence.

\* \* \*

If you find and believe from all the credible evidence in the case that the defendants were not negligent, you should not find that they were negligent from only the fact of the occurrence shown by the plaintiff's evidence.<sup>58 2</sup>

**Montana.**

The mere fact that an accident happened, considered alone, does not give rise to legal inference that it was caused by negligence or that any party to this accident was negligent or otherwise at fault.

The appellate court said that the above instruction was proper although the plaintiff contended it was inappropriate where there was substantial evidence of negligence beyond the mere accident occurrence.

Although the instruction is inapplicable with a case founded on *res ipsa loquitur*, the court stated that with a valid and complete instruction on negligence, the instruction is allowable in standard negligence actions.<sup>58 3</sup>

**New Mexico.**

It is error to instruct as follows:

As a basis for a claimed act of negligence, the plaintiff here seeks to invoke the doctrine of "*res ipsa loquitur*." To be entitled to invoke and rely on such doctrine as a basis of claimed negligence, the plaintiff must establish by a preponderance of the evidence:

1. That the instrumentality causing injury was under the sole and exclusive control and management of the defendant;
2. That injury was proximately caused by such instrumentality;
3. That the occurrence or event involving such instrumentality was of a kind which ordinarily does not happen in the absence of negligence on the part of the person in sole and exclusive control of the instrumentality, and that the plaintiff did not participate or contribute to such causation by the failure to exercise due care.

If you find by a preponderance of the evidence that all such elements of the doctrine have been established, then you may be permitted — and it is up to you whether or not you do so — to presume or infer negligence; but you are not under an obligation to do so, as any such inference or presumption is merely permissive. And if notwithstanding that the elements of any such doctrine

have been met, you choose not to make any such inference, or if you are otherwise satisfied that the defendant used due care in reasonable inspection and maintenance of the stool for its intended use, then plaintiff cannot recover.<sup>59 1</sup>

#### Pennsylvania.

Whenever there is evidence presented by both the plaintiff and the defendant that each was in his or her own lane of traffic, then the plaintiff does not establish a *prima facie* case of negligence by showing either that the defendant's vehicle skidded on ice or by presenting testimony to the effect that the defendant had crossed the center of the roadway. Thus the trial court properly refused the following charge requested by the plaintiff:

"If you find that Miss Michael violated her duty to drive on the right-hand side of the street as far as possible to the right-hand edge or curb, and that this violation was due to her skidding on ice, you are instructed that being on the wrong side of the street is negligence and that Miss Michael bears the burden of proof to show that she was not to blame."

Whenever there is conflicting testimony, it is exclusively the province of the jury to decide which of the parties' conflicting testimony is entitled to more credibility. Therefore, the plaintiff is entitled to an instruction that if it believed the plaintiff's testimony that the defendant was on the wrong side of the road, then the burden was on the defendant to prove that he/she was not negligent by being there. Contrawise, the defendant was entitled to an instruction that if it believed the defendant's testimony, then the burden was on the plaintiff to prove that the plaintiff was not negligent by being on the wrong side of the road.<sup>61 1</sup>

When a witness has testified from other than first-hand knowledge, a court need not declare a mistrial and may properly caution the jury by instructing them "to ignore officer C's impressions about things that he didn't see."<sup>61 2</sup>

#### Tennessee.

The proof in this case brings it within the scope of the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* means the thing speaks for itself. More precisely, it asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant and the occurrence is such as in the ordinary course of things, or that it does not happen if due care has been exercised, the fact of the injury itself will be deemed to afford sufficient evidence by way of inference to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. This doctrine therefore gives rise to a form of circumstantial evidence, which permits you ladies and gentlemen of the jury to choose the inference of the defendant's negligence in preference to other permissible or reasonable inferences from the facts and circumstances.<sup>61.3</sup>

<sup>52.1</sup> *Montgomery Elevator Co. v. Gordon*, 619 P2d 66 (Colo 1980).

<sup>55.1</sup> *Helton v. Forest Park Baptist Church*, 589 SW2d 217 (KyApp 1979).

<sup>58.1</sup> *Bossos v. Hertz Corp.*, 287 Minn 29, 176 NW2d 882 (1970).

<sup>58.2</sup> *Musgraves v. National Dairy Products Corp.*, (Mo), 400 SW2d 93 (1966)

<sup>58.3</sup> *Sampson v. Snow*, 632 P2d 1122 (Mont 1981)

<sup>59.1</sup> *Chapin v. Rogers*, 80 NM 684, 459 P2d 846 (1969)

<sup>61.1</sup> *Kuhn v. Michael*, 423 A2d 735 (PaSuper 1980)

<sup>61.2</sup> *Kelly v. Buckley*, 421 A2d 759 (PaSuper 1980)

<sup>61.3</sup> *Kee v. Hill*, 51 TennApp 228, 366 SW2d 520 (1962).

### § 325. —Prima facie case generally.

#### Oklahoma.

Where several causes combine to produce an injury, a defendant is not relieved from liability merely because he can show another is also responsible or because he is responsible for only some of the causes. Where there is concurrent negligence and each of the multiple causes is deemed efficient in the sense that without each the harm would not have occurred, the injury may be attributed to any or all of the forces in action.<sup>75 1</sup>

#### Pennsylvania.

Whenever there is evidence presented by both the plaintiff and the defendant that each was in his or her own lane of traffic, then the plaintiff does not establish a *prima facie* case of negligence by showing either that the defendant's vehicle skidded on ice or by presenting testimony to the effect that the defendant had crossed the center of the roadway. Thus the trial court properly refused the following charge requested by the plaintiff:

"If you find that Miss Michael violated her duty to drive on the right-hand side of the street as far as possible to the right-hand edge or curb, and that this violation was due to her skidding on ice, you are instructed that being on the wrong side of the street is negligence and that Miss Michael bears the burden of proof to show that she was not to blame."

Whenever there is conflicting testimony, it is exclusively the province of the jury to decide which of the parties' conflicting testimony is entitled to more credibility. Therefore, the plaintiff is entitled to an instruction that if it believed the plaintiff's testimony that the defendant was on the wrong side of the road, then the burden was on the defendant to prove that he/she was not negligent by being there. Contrawise, the defendant was entitled to an instruction that if it believed the defendant's testimony, then the burden was on the plaintiff to prove that the plaintiff was not negligent by being on the wrong side of the road.<sup>75 2</sup>

<sup>75.1</sup> *Boyles v. Oklahoma Natural Gas Co.*, 619 P2d 613 (Okla 1980).

<sup>75.2</sup> *Kuhn v. Michael*, 423 A2d 735 (PaSuper 1980).

### § 326. Negligence.

#### Alabama.

The trial court properly refused to give an instruction that driving above the posted speed limit is negligence per se, since such an instruction would have invaded the jury's duty.<sup>76 1</sup>

#### Minnesota.

Under the laws of our state, when and where the owner of an automobile is an occupant of said automobile in which another occupant is killed in a traffic accident, then the burden of proving that the owner, . . . was not the driver falls upon the owners. In other words, the trustee for decedent, the plaintiff herein, does not have the burden of proving that S. J. was not the driver of the Pontiac. The burden of proving S. J. was the driver rests upon the defendants.<sup>77 1</sup>

#### Oklahoma.

While the ordinary rules of the road relative to keeping to the right of center line, turning, stopping, etc., are not applicable to motor vehicles and other equipment while actually engaged in construction work on the surface of a highway, still vehicles or equipment of the various contractors engaged in such work, owe to each other the duty of exercising reasonable care in their operations so as not to negligently cause damage, having due regard to traffic and existing conditions.<sup>77 2</sup>

#### West Virginia.

The trial court properly refused to give the sudden emergency instruction that did not include the fact that the party seeking to benefit by it must not, in any way, contribute to the existence of the emergency by his own negligence.

The trial court erred, however, in giving a last clear chance instruction concerning the plaintiff's actions, in that it was unable to be shown to be non-prejudicial due to the defense verdict.<sup>77 3</sup>

<sup>76.1</sup> *Raines v. Williams*, 397 S2d 86 (Ala 1981).

<sup>77.1</sup> *Jones v. Peterson*, 279 Minn 241, 156 NW2d 733 (1968)

<sup>77.2</sup> *Peter Kiewit Sons' Co v. Grimme* (Okla), 469 P2d 1007 (1970)

<sup>77.3</sup> *Ratlief v. Yokum*, 280 SE2d 584 (WVaApp 1981).

### § 327. —Negligence defined; care required; general rules and tests.

#### Arizona.

You are instructed that a person operating a motor vehicle in urban traffic is required to exercise ordinary care to keep the vehicle under control to meet recurring traffic problems and road conditions.<sup>78 1</sup>

#### California.

You are instructed that the plaintiff and the defendant were both chargeable only with the exercise of ordinary care, but a greater amount of such care was



required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway.<sup>86 1</sup>

#### **Florida.**

When there was evidence that there had been a collision between a minibike, which had stopped at an intersection and had then made a right-hand turn, and a tractor trailer, which also had made a right-hand turn at the intersection and in so doing had "side-swiped" the plaintiff riding on the minibike, the following instruction was not error and did not invade the fact finding province of the jury:

"The court has determined, and now instructs you as a matter of law that the circumstances at the time and place of the incident complained of were such that the Defendant, LLOYD LEE JACKSON, had a duty to use reasonable care for ROBERT REARDEN'S safety."<sup>90 1</sup>

#### **Indiana.**

You are instructed that the driver of a motor vehicle on a public highway is under a duty to maintain a reasonable lookout for other persons legally proceeding on or across said highway, and to maintain reasonable control over his vehicle so as to avoid colliding with persons legally on such highway, as alleged in the complaint.

The failure of a person to use due care in maintaining a reasonable lookout for others upon said highway, or the failure to use due care in the control of one's motor vehicle, or the failure to stop the same, turn to the left or right, or slow the vehicle in order to avoid striking another, constitutes negligence, if, under similar circumstances a reasonably prudent person would have stopped said vehicle, turned it to the left or right or slowed the same in order to avoid striking another.<sup>96 1</sup>

#### **Iowa.**

Even though a pedestrian in a crosswalk has the right of way over an approaching motorist when there is danger of collision, the pedestrian still must exercise ordinary care and caution to avoid a collision with a motor vehicle when there is danger of a collision.

A pedestrian's failure to exercise such ordinary care and caution constitutes negligence.<sup>97 1</sup>

#### **Kansas.**

In these cases the plaintiffs T. S. M., and A. E. B. S., claim they were injured and sustained damage as a result of the gross and wanton negligence of the defendant K. L. S. in one or more of the following respects:

1. Making an improper right turn

2. Turning abruptly across the path of another car in attempting to enter the Emporia Street exit

3. In exceeding the speed limit

4. In attempting to enter the Emporia Street exit when the car was not under control the plaintiffs claim that one or more of the foregoing was the direct cause of their injuries and damages.

The burden of proof is upon the plaintiffs to prove that the defendant was grossly and wantonly negligent in one or more of the particulars alleged; that the defendant's gross and wanton negligence was a direct cause of the injuries and damages; that the nature, and extent and consequences of the injuries entitled the plaintiffs to an award of damages.<sup>98 1</sup>

#### **Kentucky.**

It was the duty of both B. and R. to exercise that degree of care which ordinarily careful prudent drivers of automobiles usually exercise under circumstances like or similar to those proven in this case, to so operate their automobiles:

(a) As not to bring them into collision with each other;

(b) To have them under reasonable control;

(c) To keep a look-out;

(d) To operate them at a rate of speed that was reasonable and proper.

(e) It was the further duty of B. not to enter the intersection if the light was red or amber.

(f) It was the further duty of R., in attempting to make a left turn, to first see that there was sufficient time and space to make the turn in safety, and if the light was green for eastbound traffic on Broadway, to yield the right-of-way to it.<sup>11</sup>

#### **Michigan.**

The law recognizes that children act upon childish instincts and impulses. If you find defendant knew or should have known that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.<sup>4.1</sup>

#### **Minnesota.**

The drivers of motor vehicles on our streets are under certain legal duties and obligations that they are expected to observe. It is their duty to keep a reasonable lookout and make reasonable observation of the conditions of the weather, the time of day, the conditions of the street, the traffic, and to keep their motor vehicle under reasonable control, and to proceed at a reasonable rate of speed under the conditions which exist at that particular time and place; and to exercise ordinary care to prevent doing harm or injury to others who are lawfully upon that street or the nearby streets, and to exercise ordinary care to prevent themselves from being harmed or injured by others who are using the streets in a lawful manner.<sup>4.1</sup>

The duty of reasonable care may include, among other things, the duty of every person using a public highway as a driver of a vehicle, to maintain a reasonable lookout, the duty of a driver of a vehicle to keep his vehicle under reasonable control. Whether or not a duty has been violated depends upon the risks of the situation, dangers known or to have reasonably been foreseen, and all of the then existing circumstances.

It is the law in the State of Minnesota that upon all roadways of sufficient width the vehicle shall be driven upon the right hand side of the roadway.<sup>4,2</sup>

**Missouri.**

The court instructs the jury that if you find and believe from the evidence that at the time and place mentioned in evidence Defendant G. was operating his automobile west-bound on 12th street in the lane next to the center line and that Defendant D. was operating his automobile east-bound on 12th street in the lane next to the center line, if so, and if you find and believe that as the Defendant G. approached and entered the intersection of Washington street, the Defendant D.'s automobile turned left into the lane and path of the Defendant G.'s automobile, if so, and if you find that at that time the Defendant G. applied his brakes and skidded into collision with the Defendant D.'s automobile, if so, and if you further find and believe from the evidence, that the Defendant G. in the exercise of the highest degree of care was unable to avoid coming in contact with the Defendant D.'s automobile, and if you find that in operating his automobile as aforesaid the Defendant G. was not negligent, then you are instructed that your verdict shall be in favor of Defendant G.

\* \* \*

The court instructs the jury that no vehicle shall be turned left across the roadway when any other vehicle is approaching where the same may create a traffic hazard. Therefore, if you find and believe from the evidence that at the time and place mentioned in evidence, the Defendant D. turned his automobile to the left across the roadway and into the path of the Defendant G.'s automobile, at a time when the G. automobile was approaching from the opposite direction in such close proximity as to constitute a hazard, if so, and if you find that in so doing, the Defendant D. was negligent, if so, and if you find and believe that such negligence was solely and directly responsible for the plaintiff's injuries, if any, and if you further find that the Defendant G. was not negligent as outlined in other instructions, then your verdict must be for Defendant G.

\* \* \*

If you further find that said negligence, if any, of defendants consisted in this:

As to Defendant G., that he operated his motor vehicle at said time and place in excess of the speed limit, and failed to exercise the highest degree of care to give a reasonably adequate warning of his approach, to other vehicles approaching and in said intersection, if so, and thereby failed to exercise the highest degree of care in the operation of his said-vehicle, if so; as to Defendant D., that he failed to exercise the highest degree of care, if so, to keep and

maintain a reasonably good and sufficient lookout for other vehicles and failed to exercise the highest degree of care in the operation of his vehicle at said time and place, if so, by suddenly and unexpectedly, if so, without exercising the highest degree of care to give a reasonably adequate warning, if so, turning left at said intersection; and if you find that such failures, if any, by defendants, were negligence, and directly caused injuries, if any, and damage, if any, to plaintiff, N. R., then it becomes your duty to find for the plaintiff, N. R., and against both defendants.<sup>6 1</sup>

#### Montana.

The mere fact that an accident happened, considered alone, does not give rise to legal inference that it was caused by negligence or that any party to this accident was negligent or otherwise at fault.

The appellate court said that the above instruction was proper although the plaintiff contended it was inappropriate where there was substantial evidence of negligence beyond the mere accident occurrence.

Although the instruction is inapplicable with a case founded on *res ipsa loquitur*, the court stated that with a valid and complete instruction on negligence, the instruction is allowable in standard negligence actions.<sup>8 1</sup>

The appellate court ruled that the trial court's failure to state the *proximate cause* within its contributory negligence instructions was reversible error since proximate cause is an essential element of the crime charged. The negligence of the plaintiff must be shown to be a proximate cause of the injury in order to raise the issue of contributory negligence.<sup>8 2</sup>

#### Nebraska.

It is negligence *per se* — as a matter of law — for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object in his range of vision.<sup>9 1</sup>

#### North Carolina.

The law requires a driver to exercise due care in entering an intersection even though she is entering on the green light. She must exercise the care that a reasonably prudent person would exercise, under the circumstances, taking into consideration the possibility that someone might come in the intersection in violation of the rule, coming in the intersection on the red light.<sup>12 1</sup>

#### North Dakota.

An instruction that "a pedestrian must exercise ordinary care at all times in crossing a street, whether crossing at a crosswalk or at any other point on the street," while technically correct, could well have misled a jury into concluding that no greater diligence or caution would be required of a plaintiff in exercising ordinary care while crossing in the middle of a block than would be required of her when crossing at a pedestrian crossing. It is error to not relate the degree of caution to the circumstances.<sup>13 1</sup>

**Oregon.**

Although the defendant was charged with criminally negligent homicide as the result of his car striking a pedestrian, the trial court did not commit any error by first instructing that "the defendant had a duty to exercise reasonable control over his vehicle, to maintain a reasonable lookout and to drive at a reasonable speed," which is the general standard of care owed by the defendant and all other motorists in either civil or criminal law, and then instructing that criminal liability attaches when the state shows that the defendant's conduct is more than imprudent conduct but amounts to a "gross deviation" from the standard of care.

Therefore, the court properly instructed the jury on the standard of care owed by the defendant in the following language:

"Now, the defendant had a duty to exercise reasonable control over his vehicle, to maintain a reasonable lookout and to drive at a reasonable speed. I instruct you that it is the continuing duty of a driver of a motor vehicle to keep and maintain a reasonable lookout for other vehicles or persons on the street or highway. A reasonable lookout means such as would be maintained by a reasonably prudent person under the same or similar circumstances. In determining this question you should take into consideration the extent or degree of danger reasonably to be expected. A person does not comply with the duty to keep a reasonable lookout by simply looking and not seeing that which is plainly visible and which would have been seen by a reasonably prudent person under the same circumstances. c

"I instruct you that an operator of a motor vehicle has a continuing duty to keep and maintain his or her automobile under reasonable control, and that is such a degree of control as would be exercised by a reasonably prudent person in the same or similar circumstances.

"I instruct you that a person is required by law to drive a vehicle upon a highway at a speed no greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway, the hazard at intersections, and any other conditions then existing."

And then the court also went on, and properly instructed the jury that the defendant would be guilty of criminally negligent homicide if the defendants' conduct constituted a gross deviation from this standard of care, the following language:

"You are instructed that the term criminally negligent means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstances exist. The risk must be of such nature and degree that the failure by the defendant to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in this situation.

\* \* \*

"Gross deviation from a reasonable standard of care means an extreme or serious deviation from reasonable care as compared to simple carelessness, inattention or inadvertence." <sup>16.1</sup>

**Pennsylvania.**

Whenever there is evidence presented by both the plaintiff and the defendant that each was in his or her own lane of traffic, then the plaintiff does not establish a *prima facie* case of negligence by showing either that the defendant's vehicle skidded on ice or by presenting testimony to the effect that the defendant had crossed the center of the roadway. Thus the trial court properly refused the following charge requested by the plaintiff:

"If you find that Miss Michael violated her duty to drive on the right-hand side of the street as far as possible to the right-hand edge or curb, and that this violation was due to her skidding on ice, you are instructed that being on the wrong side of the street is negligence and that Miss Michael bears the burden of proof to show that she was not to blame."

Whenever there is conflicting testimony, it is exclusively the province of the jury to decide which of the parties' conflicting testimony is entitled to more credibility. Therefore, the plaintiff is entitled to an instruction that if it believed the plaintiff's testimony that the defendant was on the wrong side of the road, then the burden was on the defendant to prove that he/she was not negligent by being there. Contrawise, the defendant was entitled to an instruction that if it believed the defendant's testimony, then the burden was on the plaintiff to prove that the plaintiff was not negligent by being on the wrong side of the road.<sup>16 2</sup>

The standard of care that the defendant is to be held to, below which he must not fall, is that care that a reasonably careful person would use given the circumstances presented by the evidence in this case to you.<sup>16 3</sup>

Although compliance with statutory requirements would prevent you from finding that the defendant was negligent per se, compliance with statutory requirements is to be considered by you only as the evidence of the exercise of minimum due care. In other words, even though the defendant has complied with a statutory requirement, this would not prevent you from finding negligence if you determine that a reasonable man, in the same circumstances as the defendant, would have taken some additional preventive measures or precautions.<sup>16 4</sup>

**Rhode Island.**

Every person driving upon the highway is charged with driving a motor vehicle within that posted speed limit, but also at a reasonable rate of speed considering all the circumstances then and there present. Failure to reduce speed under circumstances mandated by statute as requiring reduction of speed can be taken as evidence of negligence.<sup>17 1</sup>

**South Dakota.**

Giving the unavoidable accident instruction is only proper when there is evidence that something other than the negligence of one of the parties may have been the cause of the accident, especially when the element of surprise is evident.<sup>19 1</sup>

## Tennessee.

Now, the mere existence of a safety rule doesn't mean it's negligent to violate a safety rule. It may be considered by you in determining whether or not such a violation would be a negligent act or an act that a reasonably prudent person wouldn't do under the circumstances. So the existence of safety rules don't necessarily change the standard of care that one would employ at the particular time. They may be considered as suggestions, as part of the background circumstances, but you would not find that the mere violation would be negligence in and of itself unless it also amounted to a lack of care under the circumstances.<sup>20.1</sup>

<sup>78.1</sup> *Tanner v Pacioni*, 3 ArizApp 297, 413 P2d 863 (1966).

<sup>86.1</sup> *Biggar v. Carney*, 181 CalApp2d 22, 5 CalRptr 94 (1960).

<sup>90.1</sup> *Jackson v Rearden*, 392 S2d 956 (FlaDistApp 1981).

<sup>96.1</sup> *Shelby Nat Bank v. Miller*, 147 IndApp 203, 21 IndDec 675, 259 NE2d 450 (1970).

<sup>97.1</sup> *Van Treese v. Holloway (Ia)*, 234 NW2d 876 (1975).

<sup>98.1</sup> *Muhn v Schell*, 196 Kan 713, 413 P2d 997 (1966).

<sup>1.1</sup> *Bacigalupi v Mucker (Ky)*, 486 SW2d 52 (1972).

<sup>4.1</sup> *Isom v. Farrugia*, 63 MichApp 351, 234 NW2d 520 (1975).

<sup>4.2</sup> *Fisher v. Edberg*, 287 Minn 105, 176 NW2d 897 (1970).

<sup>4.3</sup> *Hovey v. Wagoner*, 287 Minn 546, 177 NW2d 796 (1970).

<sup>6.1</sup> *Roark v. Gunter (MoApp)*, 404 SW2d 1 (1966).

<sup>8.1</sup> *Sampson v. Snow*, 632 P2d 1122 (Mont 1981)

<sup>8.2</sup> *McAlpine v Midland Elec Co*, 634 P2d 1166 (Mont 1981)

<sup>9.1</sup> *Maurer v Harper*, 300 NW2d 191 (Neb 1980)

<sup>12.1</sup> *Wrenn v Waters*, 9 NCApp 39, 175 SE2d 368 (1970).

<sup>13.1</sup> *Glatt v. Feist (ND)*, 156 NW2d 819 (1968).

<sup>16.1</sup> *State v. Stringer*, 49 OrApp 51, 618 P2d 1309 (1980).

<sup>16.2</sup> *Kuhn v Michael*, 423 A2d 735 (PaSuper 1980).

<sup>16.3</sup> *McGowan v Devonshire Hall Apts*, 420 A2d 514 (PaSuper 1980)

<sup>16.4</sup> *McGowan v Devonshire Hall Apts*, 420 A2d 514 (PaSuper 1980)

<sup>17.1</sup> *Oddo v Cardi*, 100 RI 578, 218 A2d 373 (1966).

<sup>19.1</sup> *Plucker v. Kappler*, 311 NW2d 924 (SD 1981)

<sup>20.1</sup> *Gross v. Nashville Gas Co.*, 608 SW2d 860 (TennApp 1980)

### § 329. —Duty to anticipate presence of others on highway or street.

## Indiana.

On November 7, 1967, there was in full force and effect a statute in the State of Indiana which reads in part as follows:

47-2019a. Driving on Divided or Limited Access Highways:

Restrictions on use of limited access roadway. The State Highway Department may by resolution or order entered in its minutes, and local authorities may by ordinance, with respect to any limited access roadway under their respective jurisdictions, prohibit the use of any such roadway by pedestrians, bicycles or other non-motorized traffic or by any person operating a motor-driven cycle. The State Highway Department or the local authority adopting any such prohibiting regulation shall erect and maintain official signs on the limited access roadway on which such regulations are applicable and when so erected, no person shall disobey the restrictions stated on such signs.<sup>37.1</sup>

**Pennsylvania.**

The following instruction was held to properly define the respective duties of motorists at an intersection:

"A right-of-way is not a command to proceed but rather a qualified permission to do so. A driver who has the so-called right-of-way nevertheless must exercise such due care as is required by the situation confronting him. Having the right-of-way does not permit the driver to drive with reckless abandon. I charge you that even though the bus driver had the right-of-way at the intersection, he was still required by the law to have his vehicle under control at all times so as to be able to avoid an accident."<sup>40 1</sup>

<sup>37.1</sup> *Shelby Nat. Bank v. Miller*, 147 IndApp 203, 21 IndDec 675, 259 NE2d 450 (1970)

<sup>40.1</sup> *Farley v. Southeastern Pa. Transp. Auth.*, 421 A2d 346 (PaSuper 1980)

**§ 330. —Proper lookout; duty to use other faculties to avoid dangers and injuries.**

**Alaska.**

"In determining whether or not a person was negligent, you are instructed that it is the duty of the driver of any vehicle to exercise ordinary care to avoid placing himself or another person in danger; to use like care to avoid an accident from which injury might result; keeping a lookout for traffic and other conditions to be reasonably anticipated; and to keep the vehicle under control in order to avoid a collision with any person or with any other object that would be anticipated by an ordinarily prudent driver in like position."<sup>42.1</sup>

**Indiana.**

The court instructs you that one who operates a motor vehicle upon a public highway is bound to observe the highway in front of him so as to discover other vehicles thereon, and avoid colliding therewith, and to keep his vehicle under such control that he may readily operate or stop the same to avoid a collision and possible injury to other persons. He is bound to see what he could have seen if he had exercised due care under the circumstances, and if in this case you find that the defendant could have seen the truck in which plaintiff was a passenger in time to have so operated his truck or stopped the same in time to have avoided a collision with the truck in which plaintiff was a passenger, by the exercise of due care and caution required by the particular circumstances, and if you also find that the defendant did so collide with the truck in which plaintiff was a passenger, you may find the defendant was negligent in so operating his motor vehicle as to cause such collision, and if the plaintiff is not guilty of contributory negligence, your verdict should be for the plaintiff, providing that the negligent acts of defendant, if you find he was negligent, was the proximate cause of the accident.<sup>53 1</sup>



**Iowa.**

The law provides that any person driving a motor vehicle on a highway shall keep a proper lookout for other persons using the highway and for all objects which might conflict with his or her use of the highway.

By a "proper lookout" is meant that lookout which would be maintained by an ordinarily reasonable and prudent person under the same or similar circumstances.

Proper lookout means more than merely to look straight ahead or more than seeing the object. It implies being watchful of the movements of the driver's own vehicle in relation to the things seen and which could have been discerned or seen in the exercise of ordinary care. The duty of lookout to the rear does not require constant attention at all times, but only sufficient observation to establish an awareness of the presence of others at a time when a maneuver is contemplated which may endanger a following vehicle.

If either of the parties, R. Mc. or F. M., failed to keep a proper lookout, such failure would constitute negligence on his or her part.<sup>53 2</sup>

**Kentucky.**

It was the duty of both B. and R. to exercise that degree of care which ordinarily careful prudent drivers of automobiles usually exercise under circumstances like or similar to those proven in this case, to so operate their automobiles:

- (a) As not to bring them into collision with each other;
- (b) To have them under reasonable control;
- (c) To keep a look-out;
- (d) To operate them at a rate of speed that was reasonable and proper.
- (e) It was the further duty of B. not to enter the intersection if the light was red or amber.
- (f) It was the further duty of R., in attempting to make a left turn, to first see that there was sufficient time and space to make the turn in safety, and if the light was green for eastbound traffic on Broadway, to yield the right-of-way to it.<sup>55 1</sup>

**Louisiana.**

A motorist's duty is to exercise ordinary care in the operation of his vehicle to avoid injuries to anyone including a child, and there is no duty to exercise any greater degree of care with reference to a child, unless it is proved that the child's presence was known, or should have been known to the driver of the vehicle.<sup>55.2</sup>

**Minnesota.**

The duty of reasonable care may include the duty of every person using a public highway as a driver of a vehicle to use his sense of sight. It is not only the duty of each person to look, but to see what is plainly to be seen. It is also his duty to keep his vehicle under reasonable control.<sup>57.1</sup>

**North Carolina.**

The law requires a driver to exercise due care in entering an intersection, even though she is entering on the green light. She must exercise the care that a reasonably prudent person would exercise, under the circumstances, taking into consideration the possibility that someone might come in the intersection in violation of the rule, coming in the intersection on the red light.<sup>61 1</sup>

**North Dakota.**

You are instructed that a motorist approaching and traversing a crossing or intersection will be deemed to have seen what he could and should have seen; he is under a duty to see what is visible and in plain sight. The mere fact that he looked will not excuse him if he did not see what was apparent, since in such case his failure to see constitutes as great negligence, under the law, as though he had not looked at all.

However, this last rule of law would not apply to the defendant D., in this case, if you find that the wires as they hung across the street in front of him were not visible and in plain sight to such a degree that they would have been observed by an ordinarily prudent person under similar circumstances.<sup>62 1</sup>

**Oklahoma.**

You are instructed that it is the duty of a driver of an automobile to keep a reasonable lookout for the approach of all other vehicles which might interfere with the operation of a motor vehicle or constitute a hazard in the operation of a motor vehicle; and a failure on the part of either driver to perform such a duty makes said driver guilty of negligence.<sup>62 2</sup>

**Utah.**

You are instructed that a wrecker operator in darkness has the duty to reasonably warn approaching traffic of the obstruction on the roadway by displaying lights, flares, or other practical means, and failure to do so, may be negligence.<sup>64.1</sup>

**Washington.**

You are instructed that it is the primary duty of the driver approaching from the rear to avoid a collision, and, in absence of emergency or unusual conditions, the driver to the rear is negligent if he runs into the car ahead of him. The driver to the rear is not necessarily excused even in the event of an emergency, for it is his duty to keep such lookout and observation of the vehicle ahead, so that he can stop his vehicle without collision. However, the following driver is not negligent simply because he collides with a vehicle in front of him.<sup>65.1</sup>

**Wisconsin.**

In instructing the jury that P. could operate his vehicle oblivious to traffic behind him until he heard a signal, the jury was told: (1) that the front driver could assume that there was no car to his rear until he becomes aware of the car "by signal or otherwise"; (2) that the front driver was obliged to keep a lookout "to the rear if caution requires"; (3) that the front driver must look to the rear before operating his car in a manner which would create a hazard to the following vehicle; (4) that a driver cannot deviate from his course "until such movement can be made with reasonable safety"; and (5) that before any driver moves to the left of the highway he must "determine the presence, location, distance, and speed of any vehicle that might be affected." A consideration of the instructions as a whole discloses that the jury was properly instructed.<sup>67 1</sup>

**Wyoming.**

The law provides that any person driving on a highway shall keep a proper lookout for other persons using the highway. By a "proper lookout" is meant that lookout which would be maintained by an ordinarily reasonable and prudent person in light of all present conditions and those reasonably to be anticipated.

"Proper lookout" includes a duty to see objects in plain sight and a driver is bound to see reasonably that which is open and apparent and he must take knowledge of obvious dangers. This duty is not merely one of looking, but of observing which imposes upon an operator the necessity of being observant as to the traffic and general situation.<sup>67 2</sup>

<sup>42.1</sup> City of Fairbanks v. Nesbett (Alaska), 432 P2d 607 (1967)

<sup>53.1</sup> Southern Indiana Gas & Elec. Co. v. Bone, 135 IndApp 531, 180 NE2d 375 (1962).

<sup>53.2</sup> McCoy v. Miller, 257 Ia 1151, 136 NW2d 332 (1965).

<sup>55.1</sup> Bacigalupi v. Mucker (Ky), 486 SW2d 52 (1972).

<sup>55.2</sup> Trahan v. Liberty Mut. Ins. Co. (LaApp), 227 S2d 626 (1969)

<sup>67.1</sup> Hovey v. Wagoner, 287 Minn 546, 177 NW2d 796 (1970).

<sup>61.1</sup> Wrenn v. Waters, 9 NCApp 39, 175 SE2d

368 (1970).

<sup>62.1</sup> King v. Railway Express Agency, Inc. (ND), 107 NW2d 509 (1961).

<sup>62.2</sup> Peter Kiewit Sons' Co. v. Grimme (Okla), 469 P2d 1007 (1970)

<sup>64.1</sup> Taylor v. Johnson, 18 Utah2d 16, 414 P2d 575 (1966).

<sup>65.1</sup> Vangemert v. McCalmon, 68 Wash2d 618, 414 P2d 617 (1966).

<sup>67.1</sup> Zweifel v. Milwaukee Automobile Mut. Ins. Co., 28 Wis2d 249, 137 NW2d 6 (1965).

<sup>67.2</sup> Berta v. Ford (Wyo), 469 P2d 12 (1970).

**§ 331. —Relying on care of another.****California.**

A person, who, himself, is exercising ordinary care, has a right to assume that others too will perform their duty under the law and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate an accident which can be occasioned only by violation of law or duty by another. (However, an exception should be noted: The rights just defined do not exist when it is reasonably apparent to one or in the exercise of

ordinary care would be apparent to him that another is not going to perform his duty.)<sup>71 1</sup>

In the absence of reasonable cause for thinking otherwise, a person who himself is exercising ordinary care has a right to assume that other persons are ordinarily intelligent and possessed of normal sight and hearing.<sup>71 2</sup>

**Connecticut.**

In turning or attempting to turn to the right, the driver of the automobile of the defendant had the right to assume that other operators would observe the provisions of the law regarding passing on the right until he saw to the contrary, or reasonably should have seen to the contrary.<sup>71 3</sup>

**Georgia.**

Gentlemen, I charge you that if you find that the defendant by and through its operator was not negligent and did not violate the dictates of ordinary care at the time and place alleged in the petition, then I charge you that the defendant's operator would be under no duty to anticipate that anyone else might violate the law. Therefore, if you find, Gentlemen, that the plaintiff, J.D.M. violated the law of Georgia Code, § 68-1652(a) or Code § 68-1702 and that the defendant's operator was not negligent, then I charge you that the defendant's operator was under no duty to anticipate that the plaintiff J.D.M. would violate said laws, or either of them.<sup>71 4</sup>

**Iowa.**

You are instructed that operators of motor vehicles upon the highway while required to use reasonable care for their own safety and for the safety of others are not required to anticipate that others using the highway will violate the law or be guilty of negligence until such time as the driver by the exercise of reasonable care knows or should have known otherwise.<sup>74.1</sup>

**Michigan.**

I charge you that a person operating an automobile on a public highway, exercising reasonable care, may assume that others using the highway will also act with reasonable care, and he is not negligent in acting accordingly. He has a right to assume that the drivers of other vehicles will observe the law of the road, and he is not guilty of negligence in acting upon such assumption.<sup>76.1</sup>

**Minnesota.**

One who is using the streets or roads has a right to assume that all drivers about him will use reasonable care and that those about him will not violate any of these laws or rules of the road or be negligent, and then he is entitled to go ahead on that assumption. Then, if and when the contrary does appear,

if he sees that someone about him is disobeying the law or is negligent or careless, then he must use all reasonable means at his disposal to avoid injury and damage.<sup>76 2</sup>

I am going to give you what we call the rules of the road, or the common-law rules of the road, and they are these: Everyone has the same right to the use of our roads that everyone else has. But everyone that does use them is obliged to use such care that it will not result in injury to others or unduly inconvenience them. And I instruct you that it is not due care to depend upon the exercise of care by another when that dependence is itself accompanied by obvious danger.<sup>76 3</sup>

#### Montana.

A person, who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another.<sup>76 4</sup>

The appellate court ruled that the trial court's failure to state the *proximate cause* within its contributory negligence instructions was reversible error since proximate cause is an essential element of the crime charged. The negligence of the plaintiff must be shown to be a proximate cause of the injury in order to raise the issue of contributory negligence.<sup>76 5</sup>

#### New Hampshire.

The defendant had the right to rely upon H. [driver of another car] having and using the full use of his faculties and having his car under control at the time of the accident.

The defendant was not required to anticipate that H. would be operating his motor vehicle upon the public highway at the time and place of the accident while under the influence of liquor. If you find that the sole and proximate cause of the accident was the manner in which H. managed and controlled his motor vehicle at the time of the accident, the defendant is not liable and the plaintiff cannot recover.<sup>77 1</sup>

#### Pennsylvania.

An operator of a vehicle on a through highway may not, notwithstanding his superior right of way, rely blindly on an assumption that the operator of a vehicle on an intersecting street will obey the law; he must be reasonably vigilant to observe traffic conditions on the intersecting highway, and if he carelessly ignores the approach of a vehicle after he sees or should have seen that it was not in fact stopped before entering the through highway, he may be found guilty of negligence.

\* \* \*

He was on a through street and he had the right to assume, in the absence of evidence to the contrary, that all persons traversing Eleventh Street on one of the intersecting streets would stop in obedience to the mandate of the stop signs which were there present. He had the right to assume that he didn't have to anticipate that someone would run through a stop sign and present a hazard to him.

That as I said before, the driver on such a street may properly assume that all persons on intersecting streets will observe the mandates of the law and the stop signs and will stop and look unless there is something about the movement of a car which he sees which indicates no intention to stop.

D.E., driving eastward on Eleventh Street, a through one-way street, would have a right to assume that Mrs. J., on a cross-street, would obey the through traffic stop sign, and yield the right of way, and particularly is this true if Mrs. J. was traveling slowly, and reduced her speed, or was apparently stopping.<sup>79 1</sup>

<sup>71.1</sup> Gonsalves v. Petaluma Building Materials Co., 181 CalApp2d 320, 5 CalRptr 332 (1960).

<sup>71.2</sup> Seaton v. Spence, 215 CalApp2d 761, 30 CalRptr 510 (1963).

<sup>71.3</sup> McDowell v. Federal Tea Co., 128 Conn 437, 23 A2d 512 (1941).

<sup>71.4</sup> Maulding v. Atlanta Transit System, Inc., 101 GaApp 11, 112 SE2d 666 (1960).

<sup>74.1</sup> Sisson v. Weathermon, 252 Ia 786, 108 NW2d 585 (1961).

<sup>76.1</sup> Holbert v. Staniak, 359 Mich 283, 102 NW2d 186 (1960).

<sup>76.2</sup> Fisher v. Edberg, 287 Minn 105, 176 NW2d 897 (1970).

<sup>76.3</sup> Fisher v. Edberg, 287 Minn 105, 176 NW2d 897 (1970).

<sup>76.4</sup> Jessen v. O'Daniel, 136 Mont 513, 349 P2d 107 (1960).

<sup>76.5</sup> McAlpine v. Midland Elec. Co., 634 P2d 1166 (Mont 1981).

<sup>77.1</sup> Sullivan v. Sullivan, 91 NH 341, 18 A2d 828 (1941).

<sup>79.1</sup> Eisert v. Jones, 408 Pa 73, 182 A2d 717 (1962).

### § 332. —Duty to anticipate dangers and foresee natural and probable consequences of acts or omissions.

#### Arizona.

I instruct you that the driver of an automobile at night is negligent if he collides with an object which he has failed to see, and which an ordinarily prudent driver under like circumstances would have seen and with reasonable care could have avoided.<sup>81.1</sup>

#### Kentucky.

The jury was instructed that if "E. saw, or by the exercise of ordinary care could have seen" the children on the sidewalk he "should have anticipated that S. \* \* \* would get in" his path "and to operate said car so as to avoid striking S."<sup>82.1</sup>

#### Minnesota.

Under its contract with the State of Minnesota, defendant B. C. Co. was obligated to furnish and erect barricades and to erect warning signs at each

location where operations are in progress and at any other obstruction to traffic when necessary to provide adequate warning and protection for the traveling public.

It is the duty of a road construction company in lawful possession of a road construction zone, acting through its officers, agents or employees to take reasonably adequate precautions to insure the safety of the general public and to take such action which a reasonable man would believe to be effective to provide adequate warning and protection to the traveling public. Failure to do so constitutes negligence.

The term "barricade" means an obstruction or block to prevent passage and not merely a warning.<sup>82 2</sup>

#### Rhode Island.

Every person driving upon the highway is charged with driving a motor vehicle within that posted speed limit, but also at a reasonable rate of speed considering all the circumstances then and there present. Failure to reduce speed under circumstances mandated by statute as requiring reduction of speed can be taken as evidence of negligence.<sup>82 3</sup>

#### Utah.

Plaintiff on appeal argued that, since the evidence clearly established that he could not remember the elements of the event, he was entitled to an instruction on retrograde amnesia, as well as an instruction establishing him as entitled to a presumption of due care. This was the effect of the instruction actually given, clearly placing the burden of proving plaintiff's negligence on defendant, and thus there was no error.<sup>82 4</sup>

#### Washington.

You are instructed that it is the primary duty of the driver approaching from the rear to avoid a collision, and, in absence of an emergency or unusual conditions, the driver to the rear is negligent if he runs into the car ahead of him. The driver to the rear is not necessarily excused even in the event of an emergency, for it is his duty to keep such lookout and observation of the vehicle ahead, so that he can stop his vehicle without collision. However, the following driver is not negligent simply because he collides with a vehicle in front of him.<sup>83 1</sup>

<sup>81.1</sup> Schmidt v. Gibbons, 3 ArizApp 147, 412 P2d 716 (1966).

<sup>82.1</sup> Keller v. Eldridge (Ky), 471 SW2d 308 (1971).

<sup>82.2</sup> Dornack v. Barton Constr. Co., 272 Minn 307, 137 NW2d 536 (1965).

<sup>82.3</sup> Oddo v. Cardi, 100 RI 578, 218 A2d 373 (1966).

<sup>82.4</sup> Macshara v. Garfield, 20 Utah2d 152, 434 P2d 756 (1967).

<sup>83.1</sup> Vangemert v. McCalmon, 68 Wash2d 618, 414 P2d 617 (1966).

**§ 333. Exclusion of insurance from consideration of jury.****Nebraska.**

The appellate court found the joinder of the insurer and the motorist was improper. A trial court must first obtain judgment against the motorist before proceeding against the insurer.

On remand for the issue of damages, the insurer's interest can be protected by intervention. The court should not instruct the jury as to the existence of the liability insurance or the monetary limitation of coverage. The insurer's participation in the trial is not to be disclosed to the jury.<sup>89 1</sup>

<sup>89.1</sup> Eich v. State Farm Mut. Ins. Co., 305 NW2d 621 (Neb. 1981).

**§ 335. Proximate cause of injury generally.****Alabama.**

\* \* \* Now, to further explain that, of course, in order for there to be liability on the part of the defendants, there must be some negligence on the part of the defendants, which was a direct, proximate contributing cause to the collision and the injury to the plaintiff. In other words, in order to put any liability on the defendant, that must be based on some finding by you, or some reasonable satisfaction of your mind that there was some negligence on the part of the defendants, and that that negligence directly contributed to cause the collision and the plaintiff's injuries. If the collision and her injuries were directly caused by something else, other than the negligence of the defendants, then the defendants would not be liable. I think that would be obvious to you under what I have already said in the charge. So, it would be for you to say whether or not there's any negligence on the part of the defendants, if so, whether or not that negligence was the efficient, direct, immediate cause of the collision. If so, the plaintiff is entitled to recover; if not, the plaintiff is not entitled to recover.<sup>91 1</sup>

**California.**

Despite the criticism of the "but for" language used in the standard proximate cause jury instruction, the trial judge is allowed to exercise his or her discretion in selecting a preference between the standard proximate cause instruction or the legal cause instruction.<sup>95 1</sup>

**Connecticut.**

Now, a claim is made of deafness as being proximately caused by this accident. There is evidence before you to substantiate this claim which is uncontradicted and you will consider this claim of physical impairment.<sup>95.2</sup>



**District of Columbia.**

In an action for sexual assault of a minor against several defendants including the District of Columbia, the trial court's addition of the "substantial factor" test in its jury instructions on proximate cause was improper. The plaintiffs had to meet a greater burden than that ordinarily required by law to hold a defendant liable for his negligence. This amounted to reversible error.<sup>95.3</sup>

**Georgia.**

Now I charge you further that in this case the defendants contend, as one of their defenses, that the injuries and damages suffered by the plaintiffs, if any, were caused solely and proximately by the negligence of one J.T.P. in the negligent operation of his automobile, and not by any negligence on the part of the defendant. I charge you that when an injury can be traced directly to a wrongful act and, but for such wrongful act it could not reasonably be supposed that the injury would have resulted, this essential antecedent act may be said to be a proximate cause of the injury. Proximate cause does not necessarily mean that which is nearest, but refers rather to the efficient cause and, in this sense, is sometimes referred to as the immediate and direct cause, as opposed to remote. And the words proximate, immediate, and direct, are frequently used as synonymous.

I also charge you that in this case the plaintiffs would not be entitled to recover if it be shown that the proximate cause of plaintiff's injuries and damages were some act for which neither of the defendants is responsible. The proximate cause of an injury is that cause which immediately precedes and directly produces the injury, without which the injury would not have happened. So long and so far as an ultimate result can be traced to the first cause through successive stages, the responsibility rests with the one who puts in operation the chain of events which caused the wrong or injury.<sup>97.1</sup>

**Michigan.**

The proximate cause of an accident does not necessarily mean the sole cause or the only cause thereof. I instruct you that there may be more than one proximate cause of an accident. Therefore, even though you might find that the driver of the plaintiff's car, Mr. P., was in some way negligent in his manner of driving, if you further find that defendant N. was also negligent in suddenly stopping his car on the traveled portion of the highway, or in failing to warn plaintiff's driver that he was going to stop and that such negligence on the part of defendant N. was at least one of the contributing causes to the accident and the resulting injuries to the plaintiff, then, in that event, it would be your duty to bring back a verdict in favor of the plaintiff and against the defendant.<sup>6.1</sup>

**Minnesota.**

The violation of any of these common-law rules that I have just given you is negligence, and if that negligence is a direct and proximate cause of harm or

loss or damage sustained by another, then the person negligent is liable in damages to the person who is injured.<sup>8 1</sup>

**Montana.**

The appellate court ruled that the trial court's failure to state the *proximate cause* within its contributory negligence instructions was reversible error since proximate cause is an essential element of the crime charged. The negligence of the plaintiff must be shown to be a proximate cause of the injury in order to raise the issue of contributory negligence.<sup>9 1</sup>

**North Dakota.**

Our law provides that the measure of damages for an injury sustained through negligence of the defendants, where their negligence is a proximate cause of such injuries and consequent damages, is such amount which will compensate plaintiff for all detriment proximately caused by the negligence of the defendants, or either of them, whether such damages could have been anticipated or not.

\* \* \*

That with respect to the aggravation of any pre-existing physical ailment or disability, I charge you that if you find from a fair preponderance of the evidence that one or more of the defendants were negligent and that their negligence was either a proximate, concurring or the sole cause of the injuries, if any, the plaintiff sustained, that then you can allow plaintiff such sum as will compensate her for the aggravation of any pre-existing physical ailment or disability. It is the aggravation, which makes the pre-existing disability worse, more serious or acute, that is compensable, to the extent that such pre-existing condition was made worse by the negligence of the defendants or either of them. In other words it hurt or made the pre-existing condition more grave than it would have been but for the negligence of the defendants.<sup>12.1</sup>

**Wisconsin.**

You are instructed that before you can find that the collision of March, 1959, was a cause of the amputation in August of 1959 you must find that the amputation would not have been required but for the collision, or that it would have been required even though the collision had not occurred. You must be satisfied that the injuries received in the collision, if any, were substantial factors in causing the amputation. That is that the results of the collision became factors and substantially contributed to the amputation as a natural result. The word "substantial" as used here means that the collision must have had such an effect in producing the amputation as to lead reasonable men and women to regard it as a cause. If the results of the collision to Mr. C. were so insignificant that no ordinary mind would think of them as causes, then they would not be substantial factors in producing the amputation.<sup>21.1</sup>

<sup>91.1</sup> Atlantic Coast Line R. Co. v. Kines, 276 Ala 253, 160 S2d 869 (1963).

<sup>95.1</sup> Frajo v Hartland Hospital, 99 CalApp3d 344, 160 CalRptr 246 (1979).

<sup>95.2</sup> Worden v. Francis, 153 Conn 578, 219 A2d 442 (1966)

<sup>95.3</sup> Lacy v. District of Columbia, 408 A2d 985 (DCApp 1979).

<sup>97.1</sup> Broome v. Matthews, 102 GaApp 481, 116 SE2d 662 (1960).

<sup>6.1</sup> Johnston v. Narmore, 1 MichApp 160, 134 NW2d 837 (1965).

<sup>6.1</sup> Fisher v. Edberg, 287 Minn 105, 176 NW2d 897 (1970).

<sup>9.1</sup> McAlpine v. Midland Elec. Co., 634 P2d 1166 (Mont 1981).

<sup>12.1</sup> Kuntz v Stelmachuk (ND), 136 NW2d 810 (1965).

<sup>21.1</sup> Chapmitsky v. McClone, 20 Wis2d 453, 122 NW2d 400 (1963)

### § 336. —Concurrent causes of injury; joint and several liability.

#### California.

When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently and as proximate causes to the injury of another, each of such persons is liable. This is true regardless of the relative degree of the contribution. It is no defense for one of such persons that some other person, not joined as a defendant in the action, participated in causing the injury.<sup>26 1</sup>

Despite the criticism of the "but for" language used in the standard proximate cause jury instruction, the trial judge is allowed to exercise his or her discretion in selecting a preference between the standard proximate cause instruction or the legal cause instruction.<sup>26 2</sup>

#### District of Columbia.

In an action for sexual assault of a minor against several defendants including the District of Columbia, the trial court's addition of the "substantial factor" test in its jury instructions on proximate cause was improper. The plaintiffs had to meet a greater burden than that ordinarily required by law to hold a defendant liable for his negligence. This amounted to reversible error.<sup>26 3</sup>

#### Florida.

Inasmuch as the evidence in this case dealt with the operation of the station wagon being driven by one J. W., you may be concerned with the effect which her conduct, that is Mrs. W.'s conduct, may have upon the proper determination of the issues in this case. As to this phase of the case, I charge you that it is a general principle of negligence that where an injury results from two separate and distinct acts of negligence committed by different parties operating concurrently, then both are regarded as the proximate cause, and this is true even though one has been more negligent than the other. In other words, if you should find from a preponderance of the evidence, that the driver of the defendant's lumber truck was guilty of some negligence, however slight, which proximately contributed to the accident and resulting injury to the minor plaintiff, then your verdict should be in favor of the plaintiffs. Notwithstanding that you may further find that Mrs. W. may, also, have been guilty of even more negligence which proximately contributed to the accident,

for in such instance, the right of the plaintiffs to recover against the defendants, C. and S., will not be destroyed by your finding that Mrs. W.'s conduct negligence contributed in a greater or lesser degree to the accident and injury in question than did the negligence, if any, of the driver of the defendant's lumber truck. This is so because where several causes combine to concurrently help to produce or bring about an injury, each is an efficient proximate cause without which the accident would not have happened. Then, the accident may be attributed to all or any one of the causes and recovery may be had against any or all of the responsible persons, although one was more culpable than the other. Each wrongdoer is liable as though his act was the sole cause of the accident and resulting injury. However, you should understand such rule applies only in such case you find the negligence of both drivers contributed in some appreciable amount to the proximate cause of the accident, for if you should find from the preponderance of the evidence, that the sole proximate cause of the accident was due only to the negligence of the driver of the station wagon, Mrs. W., then in such latter event, you should find the defendants not guilty, and accordingly return a verdict in favor of the defendants.<sup>27 1</sup>

#### Georgia.

I charge you further that where a single injury results from the concurrent negligence of two persons, these two persons are joint tortfeasors and they may be sued jointly or severally, and recovery may be had against either or both. In such a case, the concurring negligence of one is no excuse or defense for the other.

If the negligence of two people combine to produce injury to a third person, either of the two may be sued for the entire amount of the damages incurred by the third person and the other person's negligence is no defense. In such a case, there is no accounting of comparative negligence between the two people causing the injury and one of them can be held for the entire damage even though the other was more negligent.

If you find that the plaintiff, Mrs. J., was injured by combined negligence of her husband, D.J., and the defendant, J.B.F., and that Mrs. J. had no control over the automobile in which she was riding, then you should return a verdict against the defendant in this case for whatever amount of damages you should decide she sustained.

If you find that the plaintiff, Mrs. J., was injured by the joint negligence of D.J. and the defendant, J.B.F., and you further find that Mrs. J. had no control over the automobile in which she was riding, then the defendant in this case would be liable for the damages which you find resulted from the injury to Mrs. J.<sup>27 1:1</sup>

I charge you that in an action for damages, dependent upon a tort, the liability of each and every tortfeasor is several, though the tortious act was one in which all may have participated and injured party may recover against one only slightly concerned in the wrongful act for the greatest injury which may have been inflicted by most guilty of the tortfeasors. Where a single injury results from the concurrent negligence of two persons or corporations they are joint tortfeasors and they may be used jointly or severally, that is separately. Recovery may be had against either one or both of the tortfeasors. In such cases

the concurring negligence of the one who is not sued is no excuse or defense of the other if he is otherwise liable.<sup>27 2</sup>

<sup>26.1</sup> Gonsalves v. Petaluma Building Materials Co., 181 CalApp2d 320, 5 CalRptr 332 (1960)

<sup>26.2</sup> Fraijo v. Hartland Hospital, 99 CalApp3d 344, 160 CalRptr 246 (1979).

<sup>26.3</sup> Lacy v. District of Columbia, 408 A2d 985 (DCApp 1979).

<sup>27.1</sup> Crews v. Warren (FlaApp), 157 S2d 553 (1963)

<sup>27.1:1</sup> Fields v. Jackson, 102 GaApp 117, 115 SE2d 877 (1960).

<sup>27.2</sup> Goodyear Tire & Rubber Co. v. Johnson, 120 GaApp 395, 170 SE2d 869 (1969).

### § 337. —Intervening efficient cause.

#### California.

It is generally agreed that the "but for" proximate cause instruction is inapplicable where the claim is that two independent causes have concurred to bring about an event, either of which, when operating alone, would have been sufficient to cause the result.<sup>45 1</sup>

<sup>45.1</sup> Fraijo v. Hartland Hospital, 99 CalApp3d 344, 160 CalRptr 246 (1979).

### § 338. Contributory negligence generally.

#### Arizona.

If you find that an actual or potential hazard existed, then the driver of every vehicle shall drive an appropriate reduced speed when approaching and crossing the intersection or when approaching a hill crest.

If you find that the plaintiff, C. D. violated the foregoing rule, then you are instructed that he was guilty of negligence, providing you further find his negligence was a proximate cause of the accident. \* \* \* <sup>50 1</sup>

If you find that plaintiff's decedent negligently failed to control his vehicle, and negligently failed to see the defendant's truck and trailer, and that this negligence proximately caused or proximately contributed to the cause of his death, then the plaintiff if not entitled to recover.<sup>50 2</sup>

#### Arkansas.

If you find from the evidence that, as Mrs. D. approached the intersection, she stopped at the stop sign, and you further find that at the time P.H. was nearing the intersection and was in such close proximity thereto as to constitute an immediate hazard, and you further find that P.H. was in plain view of any person making a reasonable use of his eyesight and situated as was Mrs. D. at the time, then she had no right to continue into the intersection in front of the approaching truck, and if she did so, and her car was struck by the truck and she was injured, she is not entitled to recover damages herein, and your verdict will be for the defendant.<sup>50 3</sup>

**Idaho.**

The plaintiff F. is chargeable with driving her automobile in the same manner as a reasonably prudent person under the same or similar circumstances would have done. In other words, members of the jury, the question is this: Would a reasonably prudent automobile driver have driven his automobile into the concrete base under the same circumstances as they existed on the night of April 8, 1959, when F. drove her automobile into this base? If your answer to this question is in the affirmative then she would not be guilty of negligence. On the other hand, if your answer to the question would be "no" then F. was guilty of such negligence as would defeat the plaintiff's right to recover in this case.<sup>55 1</sup>

**Illinois.**

If you believe from the evidence that the plaintiff M. R. and the defendant were both guilty of negligence which proximately contributed to the injury or injuries complained of, then, you are instructed that you have no right to compare the negligence of plaintiff, M. R. with that of the defendant, and find a verdict according to which side you think was guilty of the greater degree of negligence, for in such case it is the law that it makes no difference which was guilty of the greater degree of negligence. Under such circumstances, the plaintiff M. R. cannot recover.<sup>56 1</sup>

**Indiana.**

Contributory negligence on the part of E. L. B. is a defense in this cause of action and is defined as carelessness or negligence on the part of E. L. B. which proximately causes or contributes to the accident and her subsequent death; in other words, if a person who is killed in the course of an accident does or omits to do some act which a reasonably careful and prudent person would have done or omitted to do under the circumstances of the particular case and that act or omission proximately causes or contributes to her injury and death, the person is guilty of contributory negligence, and recovery of damages for her death cannot be made.<sup>57 1</sup>

**Michigan.**

Members of the jury, I instruct you that if you find that the collision occurred as a result of the combined negligence of the defendant N. and plaintiff's driver, Mr. P., then you would still be required to bring back a verdict in favor of the plaintiff.

In other words, if you find that Mr. P. was guilty of some negligence which contributed to the collision, but you also find that the defendant N. was also negligent and contributed to the happening of the accident, then it would be your duty to return a verdict in favor of the plaintiff and against the defendant.<sup>63.1</sup>

In respect to the claim of contributory negligence, Members of the Jury, you may take into consideration the testimony that was given by Mr. M. as to the

purpose for which he was attending the job. There is no dispute over the fact that Mr. M., as the owner of the land in question, had a right to be upon his own property, and to give the Defendants instructions from time to time. In other words, the mere fact that Mr. M. was on the job while it was being performed would not constitute negligence on his part, and if he had received no warning from Defendants, who were experienced pile drivers, of any danger to himself, and if in the exercise of ordinary care and caution he would have had no reason to believe that he was in danger, he then, of course, would not be guilty of any contributory negligence.

And if you decide that Mr. M. was guilty of contributory negligence in standing where he was at the time he was injured, either because he was warned and ignored the danger, or because you find an ordinarily prudent person would have realized his danger, then of course, your verdict will be for the Defendants, and there is no reason to proceed to the question of damages.

I further charge you that an area where construction work is being done, by its very nature, involves unusual risk in a progressively changing situation. I charge you, therefore, Members of the Jury, that if you find that the Plaintiff knew from what he observed, or should have known in the exercise of reasonable care that he was in a place of danger, then you may find him guilty of contributory negligence and your verdict will be one of No Cause of Action.

I charge you, one who knows or, in the exercise of ordinary care should have known of the existence of danger, from which injury might reasonably be anticipated, and who by his voluntary acts or omissions exposes himself to such danger, is guilty of contributory negligence if under the circumstances an ordinarily prudent person would not have incurred the risk of injury which such conduct involved.

I charge you that if you so find Plaintiff knew, or should have known of this danger, then he is guilty of negligence and your verdict will be one of No Cause of Action.<sup>63 2</sup>

#### Missouri.

The court instructs the jury that it was the duty of plaintiff to exercise the highest degree of care to keep a lookout to avoid turning into the path of other vehicles being operated on 63rd Street. Therefore, if you find and believe from the evidence that the plaintiff saw or by the exercise of the highest degree of care could have seen defendant's automobile approaching and passing, if so, in time to have stopped his automobile and thereby have avoided the collision, if so, but that plaintiff negligently failed so to do and if such negligence directly caused or directly contributed to cause the collision, if so, then your verdict must be for the defendant.<sup>63 3</sup>

Your verdict must be for the defendant, whether or not defendant was negligent, if you believe:

First, plaintiff either

failed to keep a careful lookout, or

failed to signal her intention to make a left turn, or

made a left turn when it could not be made with reasonable safety, or

drove her vehicle into collision with defendant's vehicle, or

failed to yield the right of way; and

Second, plaintiffs' conduct, in any one or more of the respects submitted in paragraph First, was negligent; and

Third, such negligence of plaintiffs directly caused or directly contributed to cause any damage plaintiffs may have sustained.<sup>63 4</sup>

Your verdict must be for the defendant whether or not Defendant was negligent if you believe:

First, Plaintiff failed to keep a careful lookout; and

Second, *Plaintiff was thereby negligent*; and

Third, such negligence of Plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.<sup>63 5</sup>

#### Montana.

The appellate court ruled that the trial court's failure to state the *proximate cause* within its contributory negligence instructions was reversible error since proximate cause is an essential element of the crime charged. The negligence of the plaintiff must be shown to be a proximate cause of the injury in order to raise the issue of contributory negligence.<sup>64 1</sup>

#### Nebraska.

If the evidence on contributory negligence is evenly balanced or preponderates in favor of the plaintiff, the jury should find for the plaintiff on that issue.<sup>64 1:1</sup>

#### New Hampshire.

If you find there was a violation of the statute and it was causal, then it could be a basis for a finding of contributory negligence. And, of course, if you find that a passing signal was given and the ordinary person of average prudence would have relied on it and acted in accordance with what the plaintiff did, then it would not be a basis for a finding of contributory negligence.<sup>64.2</sup>

#### North Carolina.

Therefore, I charge you that if the defendant has satisfied you from the evidence and by its greater weight that on this occasion the plaintiff B. C. was negligent in one or more of those respects, that is that he went out on the track, that he rode on the tow car and knew it was approaching, and that thereafter he failed to keep a proper lookout, or failed to exercise due care for his own safety, and not only that he was negligent in one or more of those respects, but that his negligence was one of the proximate causes of the resulting collision with the trailer and his injury, if the defendant has so satisfied you from the evidence and by its greater weight, it would be your duty to answer the second issue Yes. . . .<sup>64.2:1</sup>

#### North Dakota.

By "contributory negligence" is meant negligence or want of ordinary care



on the part of the one damaged which contributes to the damages complained of. In other words, contributory, within the meaning of the law of negligence, is negligence on the part of a person injured, cooperating in some degree, though slight, with the negligence of another, which helps in proximately causing the damages complained of. One who is guilty of negligence may not recover from another for damages suffered. The reason for this rule is not that the fault of one justifies the fault of another, but simply under our law there can be no apportionment of blame and damages if both parties involved are guilty of negligence proximately causing the injury.<sup>64 3</sup>

#### Pennsylvania.

The following instruction was held to properly define the respective duties of motorists at an intersection:

"A right-of-way is not a command to proceed but rather a qualified permission to do so. A driver who has the so-called right-of-way nevertheless must exercise such due care as is required by the situation confronting him. Having the right-of-way does not permit that driver to drive with reckless abandon. I charge you that even though the bus driver had the right-of-way at the intersection, he was still required by the law to have his vehicle under control at all times so as to be able to avoid an accident."<sup>68 1</sup>

<sup>60.1</sup> Deering v. Carter, 92 Ariz 329, 376 P2d 857 (1962).

<sup>60.2</sup> Schmidt v. Gibbons, 3 ArizApp 147, 412 P2d 716 (1966).

<sup>60.3</sup> Menser v. Danner, 219 Ark 130, 240 SW2d 652 (1951).

<sup>65.1</sup> Feeny v. Hanson, 84 Idaho 236, 371 P2d 15 (1962). The instruction has been changed to conform to the court's opinion.

<sup>65.1</sup> Russo v. Kellogg, 37 IllApp2d 336, 185 NE2d 377 (1962).

<sup>67.1</sup> Shelby Nat. Bank v. Miller, 147 IndApp 203, 21 IndDec 675, 259 NE2d 450 (1970).

<sup>63.1</sup> Johnston v. Narmore, 1 MichApp 160, 134 NW2d 837 (1965).

<sup>63.2</sup> Milauckas v. Meyer, 1 MichApp 500, 136 NW2d 746 (1965).

<sup>63.3</sup> Myers v. Searcy (Mo), 356 SW2d 59 (1962).

<sup>63.4</sup> George v. Wheeler (Mo), 404 SW2d 426 (1966).

<sup>63.5</sup> Rickman v. Sauerwein (Mo), 470 SW2d 487 (1971).

<sup>64.1</sup> McAlpine v. Midland Elec. Co., 634 P2d 1166 (Mont 1981).

<sup>64.1.1</sup> Hellmeier v. Policky, 178 Neb 170, 132 NW2d 760 (1965).

<sup>64.2</sup> Freedman v. Town of Exeter, 107 NH 163, 219 A2d 275 (1966).

<sup>64.2.1</sup> Comer v. Cain, 8 NCAp 670, 175 SE2d 337 (1970).

<sup>64.3</sup> Spalding v. Loyland (ND), 132 NW2d 914 (1965).

<sup>68.1</sup> Farley v. Southeastern Pa. Transp. Auth., 421 A2d 346 (PaSuper 1980).

#### § 338A. —Operator holding part of body outside vehicle.

##### Kentucky.

It was the duty of each of these drivers, plaintiff and defendant, at the time and on the occasion of this accident to operate his car with ordinary care, and that means to keep a lookout ahead for other vehicles on the highway, to drive on his own right side of the center line of the highway in approaching the top of the hill spoken of in testimony, to have his car under reasonable control and not to drive at a greater speed than reasonably prudent, considering the highway at that time and place, to give warning of his approach by sounding

the horn of his car and each in passing or undertaking to pass the other's car to pass on his own right side of the center of the highway, and to use ordinary care in driving his own car so as not to come in collision with the car of the other and it was the duty of plaintiff not to have his elbow extending beyond the window of his car if in the exercise of ordinary care it was not reasonably safe for his elbow to be in that position.<sup>73 1</sup>

<sup>73.1</sup> Gerebenics v Gaillard (Ky), 338 SW2d 216 (1960).

### § 339. —Reliance on care of person causing injury.

#### Arizona.

Every person who is himself exercising ordinary care upon the highway has a right to assume that every other person will perform his duty to exercise reasonable care and will obey the law, and he has a right to rely and act on that assumption.<sup>73 2</sup>

<sup>73.2</sup> Tanner v. Pacioni, 3 ArizApp 297, 413 P2d 863 (1966).

### § 340. —Presumptions and burden of proof as to contributory negligence.

#### Minnesota.

Now you are instructed that under Minnesota law it is presumed that B. M. at the time of the automobile collision which caused his death was acting in the exercise of due care for his own safety. However, that presumption may be rebutted or overcome by evidence to the contrary, and it is for you, the jury, to determine whether this presumption of due care is rebutted by the evidence in this case.<sup>93.1</sup>

#### North Dakota.

With reference to the claim of the defendant that plaintiff's damages were caused by the contributory negligence of the plaintiff, the burden of proof is upon the defendant to establish by a fair preponderance of the evidence that the contributory negligence of the plaintiff was a proximate cause of the alleged injuries and damages of the plaintiff.<sup>98 1</sup>

<sup>93.1</sup> Sauke v. Bird, 267 Minn 129, 125 NW2d 421 (1963).

<sup>98.1</sup> Spalding v. Loyland (ND), 132 NW2d 914 (1965).

### § 341. —Effect of contributory negligence generally; contributory negligence as proximate cause of injury.

#### Indiana.

The Indiana Supreme Court in *Huey v. Milligan*, 242 Ind 93, 175 NE2d 698,

held erroneous the instruction appearing in 2 Reid's Branson Instructions to Juries, 1960 Replacement, § 341, p. 123, because of the language "in the slightest degree." Proximate causation must be direct or material. Although in *Huey*, another instruction on proximate causation was given, the error was not cured because the erroneous instruction was mandatory and could be cured only by its withdrawal.

Contributory negligence, which is an element of defense, is any negligence on the part of the plaintiff, proximately contributing to the damages that may be complained of. So, in this case, if you should find from all of the evidence that D. K. was negligent in any manner, however slight, or that her husband was negligent in any manner, however slight, and thus his negligence is chargeable to her, which contributed to her injuries or damages, then she cannot recover against the defendant, A. P., even though you may find the defendant, A. P., himself was also guilty of negligence which proximately contributed to the plaintiff's injuries.<sup>16 1</sup>

In order to recover in this action, the plaintiff has the burden of proving by a preponderance of the evidence that the defendant committed some one or more of the acts of negligence charged in the complaint, that he himself suffered some one or more of the injuries alleged in the complaint, and that all of the remaining material allegations of the complaint are true.

If the defendant raised the issue of whether the plaintiff was guilty of some negligent act or omission which proximately contributed to cause the injuries of which he now complains, the burden is on the defendant to prove the affirmative of that issue by a preponderance of the evidence.

If you find that F. M. and R. M. were engaged in a joint enterprise, as defined in these instructions, any negligence on the part of F. M. is also negligence on the part of R. M.

The question of contributory negligence on the part of the plaintiff is an issue in this case. If plaintiff was guilty of negligence that proximately contributed to his injury then plaintiff cannot recover even though the defendant may have been negligent.

The defendant has the burden of proving by a preponderance of the evidence that plaintiff was guilty of such negligence.<sup>16.2</sup>

#### Montana.

The appellate court ruled that the trial court's failure to state the *proximate cause* within its contributory negligence instructions was reversible error since proximate cause is an essential element of the crime charged. The negligence of the plaintiff must be shown to be a proximate cause of the injury in order to raise the issue of contributory negligence.<sup>24 1</sup>

#### New York.

The following was held not to constitute reversible error:

"That negligence on the part of the defendant, no matter how slight it may be, if it is a proximate cause of the accident, is sufficient to impose negligence and liability on the defendant. Negligence on the part of the plaintiff, no matter how slight, if it is a substantial factor in producing the plaintiff's injuries, is sufficient to bar the plaintiff from recovery."

\* \* \*

I use the word "substantial" in connection with the definition of proximate cause, which I have already given to you and I would give it to you over again. When I say substantial, I mean that the negligence of either the defendant or the plaintiff must be a proximate cause of the injury, and an act or omission is a proximate cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable men would regard it as the cause of the injury.<sup>24 1 1</sup>

<sup>16.1</sup> Keck v Pozorski, 135 IndApp 192, 1 IndDec 561, 191 NE2d 325 (1963).

<sup>16.2</sup> McGee v. Knowles, 147 IndApp 76, 21 IndDec 381, 258 NE2d 417 (1970).

<sup>24 1</sup> McAlpine v Midland Elec Co, 634 P2d 1166 (Mont 1981).

<sup>24 1-1</sup> Schmoll v. Luther, 36 AppDiv2d 996, 320 NYS2d 975 (1971)

## § 342. Last clear chance; discovered peril; humanitarian doctrine.

### North Carolina.

The doctrine of last clear chance, if properly raised, should be submitted to the jury when the evidence tends to show "that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and thereafter, the defendant having the means and the time to avoid the injury, negligently failed to do so."<sup>54 1</sup>

### Texas.

It is not error to refuse to instruct the jury on the doctrines of last clear chance and discovered peril because these doctrines have been abolished in Texas and are no longer a basis for instructions in Texas.<sup>59 1</sup>

### Utah.

You are further instructed, however, that if the defendant in this case saw the wrecker and knew it to be a wrecker, in sufficient time to have reasonably avoided the collision, any negligence of J. W. T., if you so find, in failing to display lights, flares or other physical warning devices, would not be a contributing proximate cause of his death, and the defense of contributory negligence would not defeat plaintiff's recovery.<sup>59.2</sup>

**Washington.**

The “last clear chance” rule of law in this state, insofar as it is applicable to this case means: That if you find by a preponderance of the evidence that the plaintiff, B. B., was guilty of negligence in any one or more of the respects alleged against her by defendants, and, likewise find from a preponderance of the evidence that the defendant, S. J., actually saw the plaintiff, B. B., violating the law in any respect and should have appreciated the danger, if any, of a situation that was created by her negligence, if any, and thereafter failed to exercise reasonable care to avoid a collision with the said B. B., such failure, if any, on the part of S. J. would render the defendants liable in this action, and you must then find for the plaintiffs, even though said plaintiff, B. B., may also have been guilty of negligence that continued up to the instant of the injury.<sup>63 1</sup>

**West Virginia.**

The trial court properly refused to give the sudden emergency instruction that did not include the fact that the party seeking to benefit by it must not, in any way, contribute to the existence of the emergency by his own negligence.

The trial court erred, however, in giving a last clear chance instruction concerning the plaintiff's actions, in that it was unable to be shown to be non-prejudicial due to the defense verdict.<sup>64 1</sup>

<sup>54.1</sup> Cockrell v. Cromartie Transport Co., 295 NC 444, 245 SE2d 497 (1978).

<sup>59.1</sup> Texaco, Inc. v. Haley, 610 SW2d 224 (TexCivApp 1980).

<sup>59.2</sup> Taylor v. Johnson, 18 Utah2d 16, 414 P2d 575 (1966)

<sup>63 1</sup> Bockstruck v. Jones, 60 Wash2d 679, 374 P2d 996 (1962).

<sup>64.1</sup> Ratlief v. Yokum, 280 SE2d 584 (WVaApp 1981).

**§ 342A. Comparative negligence.****Colorado.**

The Colorado comparative negligence statute, Colorado Revised Statutes, § 13-21-111(1) (1973 & Supp. 1981), eliminates the fourth element of the *res ipsa loquitur* doctrine — the requirement that the plaintiff be free from contributory negligence — and modifies the second element of the *res ipsa loquitur* doctrine — the requirement that there be a finding that it is more likely than not that the defendant's negligence was the cause of the accident rather than any conduct on the part of the plaintiff. Therefore, “whenever a court can reasonably find that the event is of the kind which ordinarily would not occur in the absence of someone's negligence and that defendant's inferred negligence was, more probably than not, a cause of the injury, the doctrine of *res ipsa loquitur* applies even though plaintiff's negligent acts or omissions may also have contributed to the injury. Once the trial court rules that the doctrine is applicable, the jury must then compare any evidence of negligence of the plaintiff with the inferred negligence of the defendant and decide what percentage of negligence is attributable to each party.”<sup>66.1</sup>

**Georgia.**

The following instruction was error in that it eliminated the doctrine of comparative negligence insofar as it might relate to negligence per se:

Now in this connection, having reference now to the statutes and ordinances I have just alluded to, I charge you that should you find from the evidence in this case that either party violated the law of the state of Georgia or the City of Atlanta, such a violation would constitute negligence per se. And should you further find that that violation either one or more, if there be any such violation, directly caused or contributed to the event which is the basis of this lawsuit, it would be your duty to find for the party not so guilty of negligence on that particular issue.<sup>67.1</sup>

**Washington.**

The defendant has alleged that the plaintiff was guilty of contributory negligence.

In general, it is the duty of every person in our society to use reasonable care in order to avoid damage or injury to himself in any situation in which it could reasonably be anticipated that a failure to use such care might result in such damage or injury.

Reasonable care is that care which persons of ordinary prudence exercise in the management of their own affairs, in order to avoid injury to themselves.

Contributory negligence, therefore, is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under the same or similar circumstances, to avoid damage or injury to himself.

If you find for the plaintiff but further find that the plaintiff himself was guilty of some contributory negligence and that such negligence was a contributing cause of any injuries and damage which plaintiff may have sustained, then you must reduce the amount of damages which you have found in proportion to the negligence of the plaintiff. For example, if you find that the plaintiff was negligent and such negligence was 10, 50 or 90 per cent responsible for his accident then you will reduce any award by such percentage whatever it may be.<sup>69.1</sup>

**Wisconsin.**

You are instructed that in making such findings the court does not thereby find that the defendant V. was or was not negligent, and the court does not thereby find that the negligence of defendant V., if any, was or was not greater than, equal to, or less than the negligence of B.F. The court leaves the determination of other items of the verdict to the jury, including the apportionment of any negligence between the parties, if you determine that both parties are negligent and their negligence causal.<sup>70.1</sup>

In determining your answer to the comparative negligence question you may bear in mind the difference in the rule of negligence that applies to the defendant and the plaintiff minor boy, and determine this question in the light of the difference in these rules which apply to these parties.<sup>70.2</sup>

- <sup>66.1</sup> *Montgomery Elevator Co. v. Gordon*, 619 P2d 66 (Colo 1980) WashApp 548, 469 P2d 950 (1970)  
<sup>67.1</sup> *Reeves v. Morgan*, 121 GaApp 481, 174 NW2d 671 (1960).  
<sup>69.1</sup> *Cresap v. Pacific Inland Navigation Co.*, 2 SE2d 460 (1970) <sup>70.2</sup> *Metcalf v. Consolidated Badger Cooperative*, 28 Wis2d 552, 137 NW2d 457 (1965).

### § 343. Acts in emergencies or sudden peril.

#### Colorado.

If you find from the evidence that the accident was caused by unforeseeable and uncontrollable circumstances which the defendant, S. M., could not reasonably anticipate, and if you further find that the defendant, S. M., otherwise acted as a reasonably prudent person under the circumstances then existing, you are instructed that S. M. was not guilty of negligence and your verdict must be for the defendant, S. M., on the plaintiffs' Complaint.<sup>78 1</sup>

A party suddenly confronted with an emergency due to no negligence on his part is not guilty of negligence for an error of judgment when practically instantaneous action is required.<sup>78 2</sup>

#### Florida.

The doctrine of sudden emergency like that of unavoidable accident is an ultimate conclusion of fact, and for either or both to be given there must be sufficient facts relating to the application of these doctrines. If a factual situation exists which leads one to the conclusion of sudden emergency, it may follow that an unavoidable accident may result. Yet, an unavoidable accident can occur without a sudden emergency.<sup>78 3</sup>

#### Idaho.

A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger to himself or to others, is not expected or required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation.

If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although in the light of after events, it should appear that a different course would have been better and safer.<sup>81.1</sup>

#### Indiana.

Where one without negligence on his part is confronted with a sudden emergency without time to determine with certainty the best course to pursue, such person is not held to the same accuracy of judgment as would be required if he had time for deliberation. Accordingly, if such person exercises that degree of

care as an ordinarily prudent person would have exercised when confronted with a like emergency he would not be considered guilty of negligence, even though another course of conduct would have been more judicious, or safer, or might even have avoided the collision. The burden of proving the existence of a sudden emergency is upon the person claiming the benefit of such doctrine and will not excuse one from the consequences of an emergency originally created, either in the whole or in part, by his own negligence.<sup>84.1</sup>

#### **Iowa.**

When a person driving a motor vehicle is confronted by a sudden emergency not of his own making, and is, therefore, required to act upon the impulse of the moment, he is not held to the same accuracy of judgment as would be required of him if he had time for deliberation. Accordingly, if you find that the defendant, H. L. W., was confronted by an emergency not of his own creation, and if he exercised such care as an ordinarily reasonable, prudent and cautious man would exercise when suddenly confronted by a like emergency, and placed in similar circumstances, he is not guilty of negligence because of the result, even though another course of conduct might have been more judicious or more safe or might have avoided the accident.<sup>85.1</sup>

#### **Kansas.**

You are instructed that one, who without negligence on his own part, is suddenly placed in a position of danger requiring immediate and rapid action without time for deliberation as to the best course to pursue, is not chargeable with negligence or contributory negligence even though he omits to act in the most judicious manner. In an emergency, while it is the duty of a driver to exercise diligence to avoid injury, consideration must be given to a sudden danger which may arise, and even if the driver does not choose the wisest and best course in an emergency, he is not to blame if there is not time or opportunity for deliberation to exercise judgment.<sup>86.1</sup>

#### **Kentucky.**

If the jury believe from the evidence that the defendant, S., while operating his automobile in a careful and prudent manner within the meaning of these instructions, lost control of his automobile as a result of suddenly coming upon ice on the highway which he did not see and could not in the exercise of reasonable care have seen in sufficient time, and therefore lost control of his automobile so that he did not and could not with reasonable care have regained control of same in time to have avoided the accident then and in that event the law is for the defendant S. and the jury should so find.<sup>86.2</sup>

#### **Maryland.**

I instruct you that if a person was driving in the twilight, and was aware or should have been aware that there was a well-paved shoulder to his right, and that that person, while travelling in his proper lane, met an approaching



vehicle proceeding on the wrong side of a two-lane road, that swerving into the opposite lane instead of onto the well-paved shoulder in order to avoid a collision cannot be said to be negligence as a matter of law.<sup>86 3</sup>

#### Michigan.

(1) The emergency doctrine in law means that a person who is operating a motor vehicle and suddenly is faced with an unusual or unsuspected situation is required to act as a reasonably prudent man would or might act under the same or similar circumstances; that is, act as a reasonably prudent man would under like circumstances; however, if this emergency is brought about by his own carelessness and recklessness or negligent acts, then the emergency doctrine itself, of course, does not apply. If in this case you find that there was an emergency situation but you find that Mr. V.'s acts brought about this situation, you will not then apply the emergency doctrine to the case as I have previously given it to you.<sup>88 1</sup>

(2) The defendant in his defense claims under the rule relating to what we speak of as an emergency. An emergency is a sudden and unexpected happening that cannot be reasonably anticipated. A sudden emergency, which is brought on by negligence is a part of the negligence which produced the emergency and such emergency does not relieve the negligent driver who brought on the emergency by his negligence from responsibility therefor. When one is required to act suddenly in the face of imminent danger, the law does not require him to exercise the same degree of care as if he had had time for deliberation and full exercise of judgment, and under such circumstances, he is not required to exercise the care which on careful consideration of the circumstances after the accident it might appear he might have used to avoid the injury. If a person, through no fault on his part, is suddenly placed in a position of peril, the law makes allowance for fright, lack of judgment, excitement, provided the person invoking that rule is not guilty of negligence in placing himself in such a position of peril.<sup>88 2</sup>

#### Missouri.

The Court instructs the jury that if you find and believe from the evidence that at the time and place referred to in the evidence, defendant J. E. R. was driving and operating his automobile westwardly over Highway 150 in Jackson County, Missouri, and was at all times referred to in the evidence exercising the highest degree of care in the operation of said automobile, and if you find and believe from the evidence that when said automobile reached a point where railroad tracks cross Highway 150 at approximately Highway 150 and Prospect, the westbound lane and part of the eastbound lane of said highway at a point approximately 160 feet to the west of said railroad tracks were blocked by an automobile operated by defendant K. and an automobile operated by plaintiff B., which had collided on said highway, creating a hazard to westbound vehicles, if so, and if you find that defendant was thereby confronted with a sudden emergency, with no time to deliberate, if you so find, and that no act of defendant R. contributed to cause said emergency, if so, then the Court instructs you that defendant, J. E. R. was only required to exercise

that degree of care that a very careful and prudent person would exercise under the same or similar circumstances, and if you find he did exercise such degree of care in turning his automobile to the left of the center of Highway 150 and applying his brakes, under the circumstances aforesaid, in order to avoid striking the aforementioned automobiles and plaintiff, if you so find the facts to be, and if you further find and believe from the evidence that as a result of defendant J. E. R. applying his brakes, he locked the wheels of his automobile and was thereafter unable to turn it to the left or right, and if you find that after defendant J. E. R. locked the wheels of his automobile, the same was caused to collide with plaintiff, who was then standing on the paved portion of Highway 150 immediately to the east of the vehicle operated by defendant K., if you so find, and that defendant J. E. R. did not collide with plaintiff as a result of negligence which is submitted to you in Instruction No. 2, then you are instructed that plaintiff herein is not entitled to recover from defendant J. E. R., unless you find for plaintiff under Instruction No. 3.<sup>90 1</sup>

#### Nebraska.

It is proper to submit to the jury an instruction on the sudden emergency doctrine when there is evidence that: (1) an emergency existed; (2) the party seeking to invoke the doctrine to his benefit did not cause or contribute to the emergency; and (3) he used due care to avoid the accident.<sup>90 2</sup>

#### Virginia.

The court instructs the jury that if you believe from the evidence in the case that the defendant after the impact was acting in a sudden emergency then his actions are not measured by ordinary means but allowance must be made for the actions in the emergency; the defendant is chargeable only with what a reasonably prudent man would do under similar circumstances.<sup>7 1</sup>

The court instructs the jury that if you believe from all the evidence in this case that the defendant, J.A.F., without prior fault on her part, struck the rear of the vehicle in which the plaintiff was riding because of a sudden emergency created by the operator of another motor vehicle, and that the defendant, J.A.F., acted as a person of ordinary prudence would have acted under the same circumstances, then in so doing, she was not guilty of any negligence even though the collision caused the injuries to the plaintiff, and your verdict should be for the defendant, J.A.F.<sup>7 2</sup>

#### Washington.

You are instructed that the doctrine of sudden emergency does not apply to one who has brought about such emergency by her own negligence.

So, in this case, if you find that a sudden emergency developed in respect to the driver of defendants' automobile, then you are instructed that the defendants are not entitled to the benefit of said doctrine if such emergency was brought about by the negligence of their driver.

\* \* \*

You are instructed that the driving of the defendant, E.I.R.R., is not necessarily to be judged by the facts as they now appear before you here in court, but rather she is entitled to have her driving and conduct considered in the light of the facts as they appeared to her at the time and place in question.

It is not necessarily what was the safest thing to do or what was the wisest thing to do or what could or ought to have been done, but the question is did the defendant, E.I.R.R., at the time act as a reasonably cautious, prudent driver would have acted under the circumstances.

If E.I.R.R. did, then she cannot be charged with negligence, even though she did not do what you now believe would have been the safest thing for her to have done.<sup>9.1</sup>

You are instructed that it is the primary duty of the driver approaching from the rear to avoid a collision, and, in absence of an emergency or unusual conditions, the driver to the rear is negligent if he runs into the car ahead of him. The driver to the rear is not necessarily excused even in the event of an emergency, for it is his duty to keep such lookout and observation of the vehicle ahead, so that he can stop his vehicle without collision. However, the following driver is not negligent simply because he collides with a vehicle in front of him.<sup>9.2</sup>

#### West Virginia.

The trial court properly refused to give the sudden emergency instruction that did not include the fact that the party seeking to benefit by it must not, in any way, contribute to the existence of the emergency by his own negligence.

The trial court erred, however, in giving a last clear chance instruction concerning the plaintiff's actions, in that it was unable to be shown to be non-prejudicial due to the defense verdict.<sup>9.3</sup>

#### Wisconsin.

In this, an automobile collision case, the appellant's claim was based on the doctrine of emergency, or sudden peril. The judge's instruction to the jury included a citation of the relevant statute as to the requisites of safe driving in areas such as that in which the accident occurred, and a subsequent exhortation to the jury to determine the degree of fault on the part of appellant and the consequent degree of her contribution to the resulting damages. On appeal, the high court held that this instruction was reversible error, since appellant's claim was based on the emergency doctrine, the trial court did not find her negligent as a matter of law, and consequently the emphasis in the instruction on fault was erroneous and prejudicial.<sup>12.1</sup>

<sup>78.1</sup> Hartman v. Metzger (ColoApp), 470 P2d 66 (1970).

<sup>78.2</sup> Peek v. Forbes (ColoApp), 470 P2d 85 (1970).

<sup>78.3</sup> Scott v. Barfield (Fla), 202 S2d 590 (1967).

<sup>81.1</sup> Morford v Brown, 85 Idaho 480, 381 P2d 45 (1963).

<sup>84.1</sup> Gibson Coal Co., Inc. v. Kriebs, 150 IndApp 173, 28 IndDec 123, 275 NE2d 821 (1971).

<sup>85.1</sup> Pinckney v. Watkinson, 254 Ia 144, 116 NW2d 258 (1962).

<sup>86.1</sup> Soden v. Gemberling, 188 Kan 716, 366 P2d 235 (1961).

<sup>86.2</sup> Harris v. Thompson (Ky), 497 SW2d 422 (1973).

<sup>86.3</sup> Fouché v. Masters, 420 A2d 1279 (MdApp 1980).

<sup>88.1</sup> Barringer v. Arnold, 358 Mich 594, 101 NW2d 365 (1960).

<sup>88.2</sup> Knarian v. South Haven Sand Co., 361 Mich 631, 106 NW2d 151 (1960).

<sup>90.1</sup> Bennett v. Kitchin (Mo), 400 SW2d 97 (1966). For Instruction No. 3, see Volume 2, page 21, section 357, at note 46.1. See also Eddings v. Keller (Mo), 400 SW2d 164 (1966).

<sup>90.2</sup> Maurer v. Harper, 300 NW2d 191 (Neb 1980).

<sup>7.1</sup> Barner v. Whitehead, 204 Va 634, 133 SE2d 283 (1963).

<sup>7.2</sup> Baxley v. Fischer, 204 Va 792, 134 SE2d 291 (1964). The wording has been slightly altered to conform to the court's suggestion.

<sup>9.1</sup> Phillips v. Richmond, 59 Wash2d 571, 369 P2d 299 (1962).

<sup>9.2</sup> Vangemert v. McCalmon, 68 Wash2d 618, 414 P2d 617 (1966).

<sup>9.3</sup> Ratlief v. Yokum, 280 SE2d 584 (WVaApp 1981).

<sup>12.1</sup> Gage v. Seal, 36 Wis2d 661, 154 NW2d 354 (1967).

### § 344. Speed and control generally.

#### California.

The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care. Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all the surrounding circumstances.<sup>22 1</sup>

#### Georgia.

No person shall drive a vehicle on the street or highway at a speed which is greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards in existence. In every event, the speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with the legal requirements and the duty of all persons to use ordinary care.<sup>25 1</sup>

#### Iowa.

It was the duty of L.R.C. to have the motor vehicle operated by her under control. The operator of a motor vehicle has the same under control if he has the ability to guide and direct its course of movement, fix its speed, and can, if the occasion demands, bring it to a stop with a reasonable degree of celerity. A failure of L.R.C. to have the automobile operated by her under control would constitute negligence on her part. It is the claim of plaintiff that L.R.C. was guilty of such negligence.<sup>29.1</sup>

It is not error to require plaintiff to prove that defendant "materially reduced the speed of his motor vehicle when he knew, or in the exercise of ordinary care, should have known that the motor vehicle in which plaintiff was riding was behind him, and so close that the reduction of speed would likely result in a collision."<sup>29.2</sup>

#### Kentucky.

It was the duty of both B. and R. to exercise that degree of care which

ordinarily careful prudent drivers of automobiles usually exercise under circumstances like or similar to those proven in this case, to so operate their automobiles:

- (a) As not to bring them into collision with each other;
- (b) To have them under reasonable control;
- (c) To keep a look-out;
- (d) To operate them at a rate of speed that was reasonable and proper.
- (e) It was the further duty of B. not to enter the intersection if the light was red or amber.

(f) It was the further duty of R., in attempting to make a left turn, to first see that there was sufficient time and space to make the turn in safety, and if the light was green for eastbound traffic on Broadway, to yield the right-of-way to it.<sup>32 1</sup>

#### Nebraska.

It is negligence *per se* — as a matter of law — for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object in his range of vision.<sup>38 1</sup>

#### Nevada.

It is the duty of a driver of a motor vehicle using a public highway in the nighttime to be vigilant at all times and to drive at such rate of speed and to keep the vehicle under such control that, to avoid a collision, he can stop within the distance the highway is illuminated by its lights.<sup>38 2</sup>

#### Oregon.

Although the defendant was charged with criminally negligent homicide as the result of his car striking a pedestrian, the trial court did not commit any error by first instructing that "the defendant had a duty to exercise reasonable control over his vehicle, to maintain a reasonable lookout and to drive at a reasonable speed," which is the general standard of care owed by the defendant and all other motorists in either civil or criminal law, and then instructing that criminal liability attaches when the state shows that the defendant's conduct is more than imprudent conduct but amounts to a "gross deviation" from the standard of care.

Therefore, the court properly instructed the jury on the standard of care owed by the defendant in the following language:

"Now, the defendant had a duty to exercise reasonable control over his vehicle, to maintain a reasonable lookout and to drive at a reasonable speed. I instruct you that it is the continuing duty of a driver of a motor vehicle to keep and maintain a reasonable lookout for other vehicles or persons on the street or highway. A reasonable lookout means such as would be maintained by a reasonably prudent person under the same or similar circumstances. In determining this question you should take into consideration the extent or degree of danger reasonably to be expected. A person does not comply with the

duty to keep a reasonable lookout by simply looking and not seeing that which is plainly visible and which would have been seen by a reasonably prudent person under the same circumstances.

"I instruct you that an operator of a motor vehicle has a continuing duty to keep and maintain his or her automobile under reasonable control, and that is such a degree of control as would be exercised by a reasonably prudent person in the same or similar circumstances.

"I instruct you that a person is required by law to drive a vehicle upon a highway at a speed no greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway, the hazard at intersections, and any other conditions then existing."

And then the court also went on, and properly instructed the jury that the defendant would be guilty of criminally negligent homicide if the defendants' conduct constituted a gross deviation from this standard of care," using the following language:

"You are instructed that the term criminally negligent means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstances exist. The risk must be of such nature and degree that the failure by the defendant to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in this situation.

\* \* \*

"Gross deviation from a reasonable standard of care means an extreme or serious deviation from reasonable care as compared to simple carelessness, inattention or inadvertence."<sup>47 1</sup>

#### Pennsylvania.

Whenever there is evidence presented by both the plaintiff and the defendant that each was in his or her own lane of traffic, then the plaintiff does not establish a *prima facie* case of negligence by showing either that the defendant's vehicle skidded on ice or by presenting testimony to the effect that the defendant had crossed the center of the roadway. Thus the trial court properly refused the following charge requested by the plaintiff:

"If you find that Miss Michael violated her duty to drive on the right-hand side of the street as far as possible to the right-hand edge or curb, and that this violation was due to her skidding on ice, you are instructed that Miss Michael bears the burden of proof to show that she was not to blame."

Whenever there is conflicting testimony, it is exclusively the province of the jury to decide which of the parties' conflicting testimony is entitled to more credibility. Therefore, the plaintiff is entitled to an instruction that if it believed the plaintiff's testimony that the defendant was on the wrong side of the road, then the burden was on the defendant to prove that he/she was not negligent by being there. Contrawise, the defendant was entitled to an instruction that if it believed the defendant's testimony, then the burden was on the plaintiff to prove that the plaintiff was not negligent by being on the wrong side of the road.<sup>49.1</sup>

The following instruction was held to properly define the respective duties of motorists at an intersection:

"A right-of-way is not a command to proceed but rather a qualified permission to do so. A driver who has the so-called right-of-way nevertheless must exercise such due care as is required by the situation confronting him. Having the right-of-way does not permit that driver to drive with reckless abandon. I charge you that even though the bus driver had the right-of-way at the intersection, he was still required by the law to have his vehicle under control at all times so as to be able to avoid an accident."<sup>49 2</sup>

**Rhode Island.**

Every person driving upon the highway is charged with driving a motor vehicle within that posted speed limit, but also at a reasonable rate of speed considering all the circumstances then and there present. Failure to reduce speed under circumstances mandated by statute as requiring reduction of speed can be taken as evidence of negligence.<sup>49 3</sup>

**South Dakota.**

Giving the unavoidable accident instruction is only proper when there is evidence that something other than the negligence of one of the parties may have been the cause of the accident, especially when the element of surprise is evident.<sup>49 4</sup>

**Wisconsin.**

This rule (on speed), however, does not apply to situations where the object or obstruction ahead, although within the range of the driver's headlights or vision may not reasonably be discovered because it blends with the color of the roadway or surroundings. When I refer to an object or obstruction that may not reasonably be discovered, I mean an object or obstruction that may not be seen by a driver exercising ordinary care with respect to lookout in time to enable him to stop before reaching it.<sup>57 1</sup>

"As to subdivision (b), which inquires as to speed, at the time and place in question, the allowable maximum speed limit prescribed by law on South Delaware Avenue was 25 miles per hour, there being no evidence of any other posted speed limit. It was also the law of this state at that time that no person shall operate a vehicle at a speed greater than is reasonable and prudent under conditions, having regard for actual and potential hazards then existing; and the speed of the vehicle is to be so controlled as may be necessary to avoid colliding with any person on the highway, in compliance with legal requirements." Since a fixed speed limit was involved standard Wisconsin Jury Instruction No. 1290 appropriately adapted to the circumstances was proper. There is no prejudicial error in giving a standard instruction as to speed.<sup>57 2</sup>

\*\*\* that no person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation.<sup>57 3</sup>

- <sup>22.1</sup> Seaton v. Spence, 215 CalApp2d 761, 30 CalRptr 510 (1963).  
<sup>25.1</sup> Slaughter v. Linder, 122 GaApp 144, 176 SE2d 450 (1970).  
<sup>29.1</sup> Hamdorf v. Corrie, 251 Ia 896, 101 NW2d 836 (1960).  
<sup>29.2</sup> Stam v. Cannon (Ia), 176 NW2d 794 (1970).  
<sup>32.1</sup> Bacigalupi v. Mucker (Ky), 486 SW2d 52 (1972).  
<sup>36.1</sup> Maurer v. Harper, 300 NW2d 191 (Neb 1980).  
<sup>38.2</sup> Rocky Mountain Produce Trucking Co. v. Johnson, 78 Nev 44, 369 P2d 198 (1962).  
<sup>47.1</sup> State v. Stringer, 49 OrApp 51, 618 P2d 1309 (1980).  
<sup>49.1</sup> Kuhn v. Michael, 423 A2d 735 (PaSuper 1980).  
<sup>49.2</sup> Farley v. Southeastern Pa. Transp. Auth., 421 A2d 346 (PaSuper 1980).  
<sup>49.3</sup> Oddo v. Card, 100 RI 578, 218 A2d 373 (1966).  
<sup>49.4</sup> Plucker v. Kappler, 311 NW2d 924 (SD 1981).  
<sup>57.1</sup> Gilberg v. Tisdale, 13 Wis2d 249, 108 NW2d 515 (1961).  
<sup>57.2</sup> Nieman v. American Family Mut. Ins. Co., 38 Wis2d 62, 155 NW2d 809 (1968).  
<sup>57.3</sup> Werner Transp. Co. v. Barts, 57 Wis2d 714, 205 NW2d 394 (1973).

### § 345. —When driving at night.

#### Nevada.

It is the duty of a driver of a motor vehicle using a public highway in the night-time to be vigilant at all times and to drive at such rate of speed and to keep the vehicle under such control that, to avoid a collision, he can stop within the distance the highway is illuminated by its lights.<sup>57.2</sup>

<sup>57.2</sup> Tracy v. Pollock, 79 Nev 361, 385 P2d 340 (1963).

### § 349. —Defects and obstructions in streets and highways; ice and snow.

#### Pennsylvania.

Whenever there is evidence presented by both the plaintiff and the defendant that each was in his or her own lane of traffic, then the plaintiff does not establish a *prima facie* case of negligence by showing either that the defendant's vehicle skidded on ice or by presenting testimony to the effect that the defendant had crossed the center of the roadway. Thus the trial court properly refused the following charge requested by the plaintiff:

"If you find that Miss Michael violated her duty to drive on the right-hand side of the street as far as possible to the right-hand edge or curb, and that this violation was due to her skidding on ice, you are instructed that Miss Michael bears the burden of proof to show that she was not to blame."

Whenever there is conflicting testimony, it is exclusively the province of the jury to decide which of the parties' conflicting testimony is entitled to more credibility. Therefore, the plaintiff is entitled to an instruction that if it believed the plaintiff's testimony that the defendant was on the wrong side of the road, then the burden was on the defendant to prove that he/she was not negligent by being there. Contrawise, the defendant was entitled to an instruction that if it believed the defendant's testimony, then the burden was on the plaintiff to prove that the plaintiff was not negligent by being on the wrong side of the road.<sup>83 1</sup>



<sup>89.1</sup> Kuhn v. Michael, 423 A2d 735 (PaSuper 1980).

**§ 350. —Intersections and junctions.**

**Florida.**

When there was evidence that there had been a collision between a minibike, which had stopped at an intersection and had then made a right-hand turn, and a tractor trailer, which also had made a right-hand turn at the intersection and in so doing had "side-swiped" the plaintiff riding on the minibike, the following instruction was not error and did not invade the fact finding province of the jury:

"The court has determined, and now instructs you as a matter of law that the circumstances at the time and place of the incident complained of were such that the Defendant, LLOYD LEE JACKSON, had a duty to use reasonable care for ROBERT REARDEN'S safety." <sup>91 1</sup>

**Georgia.**

When the instruction is designated by the board, or by the local authorities having jurisdiction, as a "Yield" intersection, the driver of a vehicle approaching a "Yield" sign shall, in obedience with such sign, slow down to a speed reasonable under the existing conditions and shall yield the right-of-way to any vehicle in the intersection approaching on another highway so closely as to constitute an immediate hazard during the time such driver is moving within and across the intersection. <sup>91 2</sup>

**Missouri.**

The Court instructs the jury that if you find and believe from the evidence that Mr. N. arrived at the intersection mentioned in evidence either before or at approximately the same time that defendant did so, and that the defendant failed to yield the right of way to Mr. N. and failed to permit him to proceed across the intersection ahead of the defendant, and that in so failing the defendant failed to exercise the highest degree of care and was negligent, and that Mr. N. was injured as a direct result thereof, \* \* \* <sup>95 1</sup>

**North Dakota.**

If two vehicles enter an intersection from different streets at approximately the same time, the driver of the vehicle on the left must yield the right of way to the vehicle on the right, except in certain situations not pertinent in this case. <sup>96.1</sup>

**Pennsylvania.**

The following instruction was held to properly define the respective duties of motorists at an intersection:

"A right-of-way is not a command to proceed but rather a qualified permission to do so. A driver who has the so-called right-of-way nevertheless must exercise such due care as is required by the situation confronting him. Having the right-of-way does not permit that driver to drive with reckless abandon. I charge you that even though the bus driver had the right-of-way at the intersection, he was still required by the law to have his vehicle under control at all times so as to be able to avoid an accident." <sup>99 1</sup>

<sup>91.1</sup> Jackson v. Rearden, 392 S2d 956 (FlaDistApp 1981).

<sup>91.2</sup> Slaughter v Linder, 122 GaApp 144, 176 SE2d 450 (1970).

<sup>95.1</sup> Norris v. Winkler (Mo), 402 SW2d 24 (1966).

<sup>96 1</sup> Munro v. Privratsky (ND), 209 NW2d 745 (1973)

<sup>99.1</sup> Farley v Southeastern Pa. Transp. Auth., 421 A2d 346 (PaSuper 1980)

### **§ 353. —Closely built up, thickly settled, or business portions of city.**

#### **Wyoming.**

The court instructs the jury that it is established in this case that the lawful speed limit at the time and place where this accident occurred was 40 miles per hour. <sup>9.1</sup>

<sup>9.1</sup> Frazier v. Pokorny (Wyo), 349 P2d 324 (1960).

### **§ 354. Condition and equipment of vehicle; proper use of equipment and accessories.**

### **§ 355. —Brakes.**

#### **Maryland.**

\*\*\* I instruct you as a matter of law that there is no legally sufficient evidence upon which you could find that defective brakes caused this accident. So that, insofar as the testimony with regard to defective brakes is concerned, in your arriving at your verdict you must ignore that. <sup>21 1</sup>

#### **Rhode Island.**

On the issue of the duty to exercise due care in a sudden emergency, the court charged in part: "[W]e come to the problem of applying the brakes. Now, that is not a matter of choice. You don't have a choice within this rule of applying or not applying the brakes because if you don't apply the brakes, there is going to be a collision, obviously you are not excused by the latter part of the rule of applying or not applying the brakes." <sup>22 1</sup>

<sup>21.1</sup> Hartman v. Meadows, 243 Md 158, 220 A2d 555 (1966).

<sup>22.1</sup> Odde v. Cardi, 100 RI 578, 218 A2d 373 (1966).

**§ 357. —Horn and other signaling devices.****Indiana.**

You are further instructed that there was in force a statute of the state of Indiana on the date of the accident herein, which provided as follows:

Every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon a roadway and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused, or incapacitated person upon a highway.<sup>41 1</sup>

**Missouri.****INSTRUCTION NO. 3**

The Court instructs the jury that if you find and believe from the evidence that on April 5, 1963, on Highway 150 at the time and place mentioned in evidence, plaintiff, while standing on the south side of the center line of said highway at the driver's door of the Plymouth automobile mentioned in evidence, became and was in a position of imminent peril of being struck and injured by the Chevrolet automobile being operated by defendant, J. E. R., and that defendant, J. E. R., saw or by the exercise of the highest degree of care could have seen plaintiff in such position of imminent peril, in time thereafter, with the means and appliances at hand and with reasonable safety to himself and others, to have sounded his horn as a warning to plaintiff of the dangerous proximity of said Chevrolet automobile and could thereby have prevented the collision of said Chevrolet with the person of plaintiff, as mentioned and described in evidence, and that defendant failed to so warn plaintiff and that in so failing under the aforesaid circumstances he failed to exercise the highest degree of care and was thereby negligent, and that said negligence directly caused said Chevrolet to strike and injure plaintiff or that said negligence directly combined and concurred in part with the conduct of others to cause said Chevrolet to strike and injure plaintiff, then your verdict shall be for the plaintiff, A. L. B., and against defendant, J. E. R.

**INSTRUCTION NO. 16**

The Court instructs the jury that if you find and believe from the evidence that at the time plaintiff entered a position of imminent peril as submitted to you in Instruction No. 3, defendant J. E. R. could not have, by the exercise of the highest degree of care, in the time and distance he then had, sounded his horn as a warning to plaintiff and thereby have prevented the collision of said Chevrolet with the person of plaintiff, then you cannot return a verdict for plaintiff under Instruction No. 3 and your verdict must be for defendant J. E. R. unless you find for plaintiff under Instruction No. 2.<sup>46.1</sup>

**Wisconsin.**

With respect to subdivision (d) of the first question, which inquires as to

whether or not the defendant, K. G., was negligent in failing to sound his horn at and just prior to the collision in question, you are instructed that there was in full force and effect Section 85.67(2), Wisconsin Statutes, which reads in part as follows:

"Horns and warning devices. Every motor vehicle, when operated upon a highway, shall be equipped with a horn in good working order, capable of emitting sound audible under normal conditions for a distance of not less than 200 feet \* \* \*."

This subdivision (d) of Question 1 presents a pure question of fact. You will answer it as you find from the greater weight of the credible evidence, to a reasonable certainty, the fact to be.<sup>53.1</sup>

<sup>41.1</sup> *Shelby Nat. Bank v. Miller*, 147 IndApp (1966).

203, 21 IndDec 675, 259 NE2d 450 (1970).

<sup>53.1</sup> *Jolitz v. Graff*, 13 Wis2d 190, 108 NW2d

<sup>46.1</sup> *Bennett v. Kitchin* (Mo), 400 SW2d 97 567 (1961).

### § 357A. —Mirror.

#### Florida.

Now, Section 320.54 of the Florida Statutes provide[s] as follows, and I quote now from that statute:

"Each truck driven or propelled or operated over a state road shall be equipped with a mirror located in such position as to show the driver thereof, the approach of vehicles from the rear."

That is the statute, the last of the quote from the statute. This statute is in recognition of the commonly known fact that trucks, being slow moving vehicles, and being limited by law to a less rate of speed than passenger cars, are liable at any and all times to be overtaken and passed by faster moving automobiles, particularly passenger carrying automobiles, and therefore the effect of the statute is to impose on truck operators the duty of anticipating the approach from their rear, and to enjoin on them the responsibility for avoiding collisions with their trucks when so overtaken, by holding their trucks to the right hand side of the paved portion of the road when being overtaken by automobiles that are in the act of passing such trucks when moving at a slower rate of speed on the highway than other traffic.<sup>54.1</sup>

<sup>54.1</sup> *Crews v. Warren* (FlaApp), 157 S2d 553 (1963).

### § 364. Intoxication of operator or previous drinking of intoxicating liquors.

#### Illinois.

A person is "intoxicated" when as a result of drinking alcoholic liquor there is an impairment of his mental or physical faculties so as to diminish his ability to think and act with ordinary care.<sup>71.1</sup>

Defendant correctly states that "driving" is an essential element of the offense of "driving while intoxicated." So also is it true that it is not necessary for the State to show that the defendant was observed actually operating the vehicle. Further, the testimony of one witness, such as the arresting officer, may be sufficient to sustain a conviction and a conviction may be sustained upon circumstantial as well as direct evidence.<sup>71 2</sup>

#### **Maryland.**

It was not improper for the court to read to the jury provisions from the Maryland Transportation Code Annotated, § 21-902 (1977), which defined "driving while intoxicated" and "driving while ability impaired by alcohol," because the court subsequently explained to the jury the definitions in general terms and further instructed the jury that a violation of the statute by the driver, although evidence of negligence, was not enough to enable the plaintiff to recover unless also shown that the negligence was a proximate cause of the injuries. Although not improper to read to the jury statutory definitions of intoxication, a verdict can be supported only if there is some evidence of the driver's condition, consumption of alcohol by the driver, or some observable conditions of intoxication.<sup>71 3</sup>

#### **Minnesota.**

It is the law in this state that a person under the influence of intoxicating liquor is required to exercise the same degree of care as a sober person. There is no direct evidence in this case that Mr. G. was intoxicated at the time this accident took place. There is some evidence both direct and circumstantial that some drinking had been done before the accident happened. It is a fact issue for your determination from the evidence before you in passing on the question of negligence of G. whether or not his mind and physical reactions were affected by alcoholic beverage consumed so that it was reflected in the manner in which he operated his automobile at the time so that he did not for that reason exercise the care an ordinarily prudent person would have exercised under similar circumstances.<sup>71 4</sup>

#### **Montana.**

The appellate court ruled that the trial court's failure to state the *proximate cause* within its contributory negligence instructions was reversible error since proximate cause is an essential element of the crime charged. The negligence of the plaintiff must be shown to be a proximate cause of the injury in order to raise the issue of contributory negligence.<sup>71 4.1</sup>

#### **Nebraska.**

Any evidence you find of the drinking of intoxicants by either the plaintiff or the defendant shall not, by itself, be considered as negligence or gross negligence, but is a circumstance which may be considered by you together with all other facts and circumstances in the case in determining the existence or nonexistence of negligence or gross negligence.<sup>71 5</sup>

## Ohio.

Under the influence of intoxicating liquor within the meaning of the ordinance [§ 21-6-9 of the Ordinances of the city of Toledo] can be defined as "that condition in which a person has consumed sufficient alcohol as to affect his nervous system, brain, or muscles to the extent as to impair to an appreciable degree his ability to operate a motor vehicle in the manner that an ordinary, prudent and cautious man in the full possession of his faculties would drive or operate a similar vehicle."<sup>71 6</sup>

## Pennsylvania.

A trial court judge may properly instruct the jury regarding the mental and physical conditions that would constitute "being under the influence" of alcohol and may specifically point out to the jury that these conditions must exist to a degree that renders the person incapable of safe driving regardless of the fact that the state statutory vehicle code limits the offense of driving while intoxicated to that of "driving while intoxicated to a degree which renders a person incapable of safe driving."<sup>73 1</sup>

## Wisconsin.

The court first read the material portions of § 325.235(1), Wisconsin Statutes, including (c) previously quoted. Then the court said:

A person is also under the influence of intoxicating liquor when his conduct, his exercise of judgment or his use of his faculties is interfered with to an appreciable extent by the consumption of intoxicating liquor. A person is also under the influence of intoxicating liquor if it is a fact that there was fifteen-hundredths of one percent of alcohol in his blood and there is other corroborating physical evidence as required by the statute. If you find \* \* \* that the alcohol content was more than fifteen-hundredths of one percent of alcohol by weight, then such amount of alcohol is sufficient to support a finding that Mr. K. was under the influence of intoxicating liquor at the time of the accident, if you also find that there is other corroborating physical evidence. \* \* \* If you are satisfied to a reasonable certainty by a clear and satisfactory preponderance of the evidence, that K. was negligent in the manner in which he managed and controlled his automobile and if you are also satisfied that at the time K. was under the influence of intoxicating liquor you should answer this question "Yes," otherwise you should answer it "No."<sup>75.1</sup>

<sup>71.1</sup> *Edenburn v. Riggins*, 13 IllApp3d 830, 301 NE2d 132 (1973).

<sup>71.2</sup> *People v. Wright*, 49 IllApp3d 356, 364 NE2d 355 (1977).

<sup>71.3</sup> *Fouche v. Masters*, 420 A2d 1279 (MdApp 1980).

<sup>71.4</sup> *Gebhard v. Niedzwiecki*, 265 Minn 471, 122 NW2d 110 (1963).

<sup>71.4.1</sup> *McAlpine v. Midland Elec. Co.*, 634 P2d 1166 (Mont 1981).

<sup>71.5</sup> *Raskey v. Hulewicz*, 185 Neb 608, 177 NW2d 744 (1970).

<sup>71.6</sup> *City of Toledo v. Starks*, 25 OhApp2d 162, 54 OhO2d 339, 267 NE2d 824 (1970).

<sup>73.1</sup> *Commonwealth v. Benson*, 421 A2d 383 (PaSuper 1980).

<sup>75.1</sup> *Martell v. Klingman*, 11 Wis2d 296, 105 NW2d 446 (1960).

**§ 364A. Breathalyzer test.****Pennsylvania.**

A trial court may properly instruct a jury that a police officer, when administering a "breathalyzer" test to a defendant suspected of driving while intoxicated, had no legal obligation to notify defendant that he could have the test administered by a physician of his own choice.<sup>75 2</sup>

<sup>75.2</sup> Commonwealth v. Benson, 421 A2d 383 (PaSuper 1980).

**§ 366. Sudden illness, dizziness, or disability of operator.****Colorado.**

The court instructs the jury that if you find from a preponderance of the evidence that shortly before the accident in question the defendant, H., was suddenly stricken by illness which he had no reason to anticipate and whereby he was rendered unconscious and thereby lost control of his automobile, and if you further find that the accident was proximately caused by said sudden illness, then and in that event your verdict shall be for the defendants.

If on the other hand the defendant, H., was not suddenly stricken by illness or if you find he did have an illness but had reason to anticipate such illness and the resulting collisions and damage were proximately caused by such illness, then and in that event your verdict shall be for the plaintiff.

\* \* \*

If you find from the evidence that the defendant, H., knew or in the exercise of reasonable care should have known that he was in such a state of fatigue or exhaustion from overwork or lack of sleep or both that he could not operate a motor vehicle on a public highway with reasonable care for the safety of himself or others, you must find that his conduct in driving a vehicle on a public highway under such circumstances was negligence.<sup>78 1</sup>

**Florida.**

The fact that the defendant's automobile left the roadway and ran up on to the sidewalk, which is admitted, is prima facie evidence of negligence, that is to say, negligence on its face, nothing else appearing. This prima facie evidence, however, may be overcome by proof of surrounding circumstances and conditions which will eliminate the character of negligence from the transaction.

In this connection, the court charges you that a driver who suffers a sudden loss of consciousness or blackout is not guilty of negligence unless it is made to appear from the preponderance of the evidence that prior to such loss of consciousness he knew or by the exercise of ordinary care should have known that he might suffer a loss of consciousness.

Therefore, if you find from the evidence that the automobile of the defendant left the road and struck the plaintiff by reason of a loss of consciousness by the driver it will be your duty to return a verdict for the defendant unless you find that before the accident he knew, or by the exercise of that degree of care required of persons of like age, intelligence and experience that he might experience such a loss of consciousness.<sup>78 2</sup>

I charge you that where one has notice or knowledge of the existence of a physical ailment that necessitates the use of drugs that may impair the power to control or operate a motor vehicle, it is negligence to an extreme degree for such person to operate such vehicle.<sup>78 3</sup>

#### Utah.

The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no right to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages.

A driver of an automobile who is stricken by paralysis, seized by a fit or otherwise rendered unconscious and who still continues to drive while unconscious and causes damages or injury to another cannot be held responsible therefor unless he was reasonably aware that he was about to lose consciousness to the extent that a person of ordinary prudence would not attempt to continue driving.

You are instructed that fainting or loss of consciousness while driving is a complete defense to an action based on negligence if such loss of consciousness was not foreseeable. If you find that defendant, H.P., was suffering from an unforeseen insulin reaction, resulting in a fainting spell or loss of consciousness at the time of this accident, then you must return a verdict in favor of the defendant and against the plaintiffs.

On the other hand, if the insulin shock that defendant suffered was foreseeable and he could have done something about it, and thereby avoided the accident, then and in that event he would be charged with negligence proximately causing the accident.<sup>78 4</sup>

<sup>78.1</sup> Renell v. Argonaut Liquor Co., 148 Colo 154, 365 P2d 239 (1961)

<sup>78.2</sup> Malcolim v. Patrick (FlaApp), 147 S2d 188 (1962).

<sup>78.3</sup> Busser v. Sabatasso (FlaApp), 143 S2d 532 (1962)

<sup>78.4</sup> Porter v. Price, 11 Utah2d 80, 355 P2d 66 (1960)

### § 366A. Operator falling asleep.

#### Georgia.

A driver is not guilty of wanton misconduct when he falls asleep at the wheel of an automobile unless he knows or should have known that he was in no condition to drive an automobile. When one has notice or knowledge of the existence of a physical impairment which may come on suddenly and destroy



his power to control an automobile it is negligence to an extreme degree for such person to operate such automobile. Such conduct constitutes gross negligence.<sup>80 1</sup>

<sup>80 1</sup> Smith v Davis, 121 GaApp 704, 175 SE2d 28 (1970).

### § 368. Identity of operator.

#### Minnesota.

Under the laws of our state, when and where the owner of an automobile is an occupant of said automobile in which another occupant is killed in a traffic accident, then the burden of proving that the owner was not the driver falls upon the owners. In other words, the trustee for the decedent, the plaintiff herein, does not have the burden of proving that S. J. was not the driver of the Pontiac. The burden of proving S. J. was the driver rests upon the defendants.<sup>83 1</sup>

<sup>83 1</sup> Jones v Peterson, 279 Minn 241, 156 NW2d 733 (1968).

### § 370. Effect of violation of statute generally.

#### Arizona.

Ordinarily it is a question of fact for the jury to decide whether particular conduct was negligent. Such is not the case, however, where a person violates a specific rule made by the legislature to govern the kind of conduct in question. Where an automobile driver violates a statute or ordinance enacted for the safety of persons or property, such a violation is negligence as a matter of law.<sup>86 1</sup>

#### California.

The violation of a statute or ordinance, except as to speed, constitutes negligence as a matter of law. Unless, however, such violation is a proximate cause of injury it becomes immaterial. There must appear to be a causal connection between the violation of law and the injury before it becomes material to the issue.<sup>92.1</sup>

If you find that a party to this action violated any of the statutes just read to you, you will find that such violation was negligence unless you find by a preponderance of the evidence that she did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.<sup>92.2</sup>

#### Connecticut.

In view of the judicial admission made by the defendant during the course

of the trial, you are obliged to find in this case that the defendant did in fact violate the parking statute which I have been discussing, and that such violation constitutes negligence in and of itself on the part of the defendant.<sup>93 1</sup>

#### North Dakota.

A violation of a statutory duty is not merely a circumstance but evidence of negligence, and it is improper to charge merely that it is the former.<sup>3 1</sup>

#### Oklahoma.

The violation of an ordinance is to be deemed negligence *per se* if the injury complained of (a) was caused by the ordinance's violation, (b) was of the type intended to be prevented by the ordinance and (c) the injured party was one of the class meant to be protected by the ordinance.<sup>4 1</sup>

#### Pennsylvania.

The statutory requirement of inspection imposes upon the owner of the property a minimum standard of duty below which he may not fall. If the owner does not comply with the statutory requirement, this constitutes negligence *per se*.<sup>4 2</sup>

#### Tennessee.

Now, the mere existence of a safety rule doesn't mean it's negligent to violate a safety rule. It may be considered by you in determining whether or not such a violation would be a negligent act or an act that a reasonably prudent person wouldn't do under the circumstances. So the existence of safety rules don't necessarily change the standard of care that one would employ at the particular time. They may be considered as suggestions, as part of the background circumstances, but you would not find that the mere violation would be negligence in and of itself unless it also amounted to a lack of care under the circumstances.<sup>5.1</sup>

#### Washington.

A violation, if you find that was such a violation, of a statute governing the operation of a motor vehicle is negligence as a matter of law.

While the violation of a positive statute is negligence, such negligence will not render a defendant liable for damages unless such violation proximately contributed to or proximately caused the injury.<sup>9 1</sup>

<sup>86.1</sup> Schmidt v. Gibbons, 3 ArizApp 147, 412 P2d 716 (1966).

<sup>92.1</sup> Chisholm v. California Jockey Club, 164 CalApp2d 367, 330 P2d 676 (1958).

<sup>92.2</sup> Newmann v. Bishop, 130 CalRptr 786, 59 CalApp3d 451 (1976).

<sup>93.1</sup> Busko v. DeFilippo, 162 Conn 462, 294 A2d 510 (1972).

<sup>3.1</sup> Glatt v. Feist (ND), 156 NW2d 819 (1968).

<sup>4.1</sup> Boyles v. Okla. Natural Gas Co., 619 P2d 613 (Okla. 1980).

<sup>4,2</sup> McGowan v Devonshire Hall Apts., 420 A2d 514 (PaSuper 1980).

<sup>5,1</sup> Gross v. Nashville Gas Co., 608 SW2d 860 (TennApp 1980)

<sup>9,1</sup> Harvey v Wight, 68 Wash2d 205, 412 P2d 335 (1966)

### § 371. —Brakes.

#### Alabama.

Now, what is effectively setting the brake thereon? Well, if this defendant here left that car unattended on a public street, suppose that after she left it it got loose, but the reason it got loose was because of some fault it had of a secret nature or kind which she didn't know about and didn't have a reasonable chance to know about, but she had insofar as a reasonable prudent person could do it, she had effectively set the brake on it without any knowledge or notice that it would not work — suppose that is true? Well, that wouldn't constitute any violation of the statute. But if she carelessly or inadvertently or unthinkingly set the brake on it only partially when the brake was fully capable of being set effectively and when she could have set it effectively, but if she didn't do that and left it unattended on a public street, then that would be a violation of this statute.<sup>10,1</sup>

<sup>10,1</sup> Dean v. Mayes, 274 Ala 88, 145 S2d 439 (1962).

### § 373. —Horn, bell, or other signaling device.

#### Indiana.

On the date of the collision described in the pleadings there was a statute [§ 47-2229(a), Burns' 1952 Replacement] in the state of Indiana which provided in substance that every motor vehicle shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet and providing further that the driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn. Any violation of this provision of the Indiana law on the part of the plaintiff constitutes evidence of negligence on his part.<sup>24,1</sup>

<sup>24,1</sup> Lawson v. Webster, 133 IndApp 296, 181 NE2d 870 (1962)

### § 376. — Right of way at intersections.

#### Georgia.

I charge you that if you find from the evidence that the plaintiff, J.D.M., violated the provisions of the section [Georgia Code, § 68-1652(a) requiring driver to stop at through highway] I have read to you, you will find that said plaintiff, J.D.M. is guilty of negligence per se; that is, negligence as a matter of law; and in the same connection I charge you that if you find from the

evidence that the plaintiff, J.D.M., violated this statute and further find from the evidence that this violation by the plaintiff, J.D.M., constituted the sole proximate cause of the damage, if any, to the plaintiffs, then I instruct you that you will return a verdict for the defendant in both cases.<sup>35 1</sup>

#### North Dakota.

If two vehicles enter an intersection from different streets at approximately the same time, the driver of the vehicle on the left must yield the right of way to the vehicle on the right, except in certain situations not pertinent in this case.<sup>37 1</sup>

<sup>35.1</sup> *Maulding v Atlanta Transit System, Inc.*, 101 GaApp 11, 112 SE2d 666 (1960)      <sup>37.1</sup> *Munro v Privratsky* (ND), 209 NW2d 745 (1973)

### § 377. — Duty to stop at stop signs.

#### Arizona.

The following instruction is erroneous as the ordinance quoted is invalid:

It may become necessary for you to consider in your deliberations certain laws of this state and ordinances of the city of Phoenix which were in effect at the time of the collision and which controlled the operation of the motor vehicles.

The first one is the City of Phoenix Ordinance: A private emergency vehicle when in use in an emergency situation shall come to a full stop at all traffic control devices requiring a stop under normal circumstances, but may then proceed immediately as long as life or property are (sic) not endangered by so proceeding.

Should you find that any party to this suit violated any of the foregoing laws, then that party would be negligent as a matter of law.<sup>38 1</sup>

#### California.

The driver of any vehicle approaching a stop sign at the entrance to, or within an intersection shall stop as required by Section 22450 and shall then yield the right of way to other vehicles which have approached or are approaching so closely from another roadway as to constitute an immediate hazard and shall continue to yield the right of way to such approaching vehicles until such time as he can proceed with reasonable safety.<sup>38.2</sup>

#### Indiana.

On November 7, 1967, there was in full force and effect a statute in the State of Indiana which reads in part as follows:

47-2019a. Driving on Divided or Limited Access Highways.

Restrictions on use of limited access roadway. The State Highway Department may by resolution or order entered in its minutes, and local authorities may by ordinance, with respect to any limited access roadway under their

respective jurisdictions, prohibit the use of any such roadway by pedestrians, bicycles or other non-motorized traffic or by any person operating a motor-driven cycle. The State Highway Department or the local authority adopting any such prohibiting regulation shall erect and maintain official signs on the limited access roadway on which such regulations are applicable and when so erected, a person shall disobey the restrictions stated on such signs.<sup>38.3</sup>

<sup>38.1</sup> Phoenix Respirator Ambulance Service, Inc. v. McWilliams, 12 ArizApp 186, 468 P2d 951 (1970).

<sup>38.2</sup> Newmann v Bishop, 130 CalRptr 786, 59 CalApp3d 451 (1976).

<sup>38.3</sup> Shelby Nat. Bank v. Miller, 147 IndApp 203, 21 IndDec 675, 259 NE2d 450 (1970).

### § 379. — Following too close to vehicle in front.

#### Michigan.

Now, we have in Michigan a motor vehicle code which defines, which I might call the rule of the road, and some of the motor vehicle provisions are applicable in this case and I will read some of them to you.

"Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed, not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead."

Now, the assured clear distance ahead means that space in the direction of moving wherein objects can be seen by the driver and that part of such space as can be traveled by the vehicle under the circumstances existing with reasonable safety to persons and property. It is not enough that the driver be able to begin to stop within the range of his vision or that he used his diligence to stop after discerning an object. The law makes no allowance for delays in action. He must upon discovering an object perform the manual acts necessary to avoid striking such object. The assured clear distance ahead is limited to that traveled portion of the highway that can be seen and observed by the operator of the vehicle and if the same is limited by a brow of a hill or curve or by darkness, then such assured clear distance ahead extends to such limit of vision. Any person who operates a motor vehicle at such rate of speed that same cannot be stopped within the assured clear distance ahead is guilty of negligence as a matter of law.<sup>43.1</sup>

#### Washington.

You are instructed that it is the primary duty of the driver approaching from the rear to avoid a collision, and, in absence of an emergency or unusual conditions, the driver to the rear is negligent if he runs into the car ahead of him. The driver to the rear is not necessarily excused even in the event of an emergency, for it is his duty to keep such lookout and observation of the vehicle ahead, so that he can stop his vehicle without collision. However, the following driver is not negligent simply because he collides with a vehicle in front of him.<sup>43.2</sup>

<sup>43-1</sup> Knarian v South Haven Sand Co., 361 Mich 631, 106 NW2d 151 (1960).

<sup>43-2</sup> Vangemert v McCalmon, 68 Wash2d 618, 414 P2d 617 (1966).

## § 381. — Speed.

### Alabama.

The trial court properly refused to give an instruction that driving above the posted speed limit is negligence per se, since such an instruction would have invaded the jury's duty.<sup>60 1</sup>

### Georgia.

It is error to charge as follows when proper notice has not been posted on the highway:

The laws of Georgia prohibit the operation of an automobile at a speed in excess of 35 miles per hour on a public highway in a residence district. . . . If you find that Mr. H. was driving his motor vehicle in excess of 35 miles per hour on a public highway of this State in a residence district, such conduct would amount to negligence as a matter of law.<sup>62 1</sup>

### Indiana.

On the day of the collision described in the pleadings there was in full force and effect in the state of Indiana a statute which provided as follows [reading from § 47-2004, Burns' 1952 Replacement].

A violation of any of the provisions of this statute constitutes evidence of negligence on the part of the violator.<sup>64 1</sup>

You are instructed that there was in full force and effect a statute in the State of Indiana on November 7, 1967, which reads in part as follows:

Burns' Sec. 47-2004. Speed Regulations. (c) Prima facie speed limits. Where no special hazard exists, the following speeds shall be lawful, but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

(3) . . . Provided, that on interstate defense network of dual highways a speed of seventy (70) miles per hour shall be lawful.

At the time and place of this accident, the applicable speed limit was seventy miles per hour.

You are further instructed that there was in force a statute of the State of Indiana on the date of the accident herein, which provided as follows:

47-2004 (a) No driver shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so restricted as may be necessary to avoid colliding with any person, or vehicle or other conveyance on or near, or entering the highway in compliance with legal requirements and with the duty of all persons to use due care.

(d) The driver of every vehicle shall, consistent with the requirements in subsection (a), drive at an appropriate reduced speed when . . . special hazards exist with respect to pedestrians or other traffic by reason of weather or highway conditions.<sup>64 2</sup>

Violation of a statute in the State of Indiana is *prima facie* evidence of negligence and places upon the violator the burden of showing a justifiable excuse for such a violation. If he shows by a preponderance of the evidence that he had a justifiable excuse for such violation, he is not negligent on the account of the statutory violation.<sup>64 3</sup>

<sup>60.1</sup> *Raines v. Williams*, 397 S2d 86 (Ala 1981).

<sup>62.1</sup> *Harper v. Brown*, 122 GaApp 316, 176 SE2d 621 (1970)

<sup>64.1</sup> *Lawson v. Webster*, 133 IndApp 296, 181 NE2d 870 (1962)

<sup>64.2</sup> *Shelby Nat. Bank v. Miller*, 147 IndApp 203, 21 IndDec 675, 259 NE2d 450 (1970).

<sup>64.3</sup> *Shelby Nat. Bank v. Miller*, 147 IndApp 203, 21 IndDec 675, 259 NE2d 450 (1970)

### § 383. Effect of violation of ordinance generally.

#### Connecticut.

In view of the judicial admission made by the defendant during the course of the trial, you are obliged to find in this case that the defendant did in fact violate the parking statute which I have been discussing, and that such violation constitutes negligence in and of itself on the part of the defendant.<sup>74 1</sup>

#### Georgia.

However, I call your attention to this: that the ordinance, or portion of an ordinance, sets out in the cross-bill in the answer of the defendant and has, by agreement of the parties, been introduced into evidence under the agreement that that portion of such city ordinance is set out correctly. As to ordinances of municipalities I further charge you that the courts do not take judicial cognizance of city ordinances. In order for the jury and court to consider the terms of a city ordinance it must be pled and proved. That portion of the city ordinance which I have read to you is admitted by the parties to be correct and is in evidence. I charge you that if you should find from the evidence that the plaintiff, Mrs. V. B., was, at the time of this collision, operating her automobile in violation of an ordinance of the City of Athens regulating speed, such illegal operation would constitute negligence *per se* on the part of the plaintiff.<sup>75 1</sup>

<sup>74.1</sup> *Busko v. DeFilippo*, 162 Conn 462, 294 A2d 510 (1972)

<sup>75.1</sup> *Burton v. Brown*, 101 GaApp 527, 114 SE2d 386 (1960).

### § 386. —Speed.

#### Georgia.

Now, Gentlemen, I charge you that the plaintiff alleges that the defendant violated the speed limit — the speed limit at the time and place established by a proper ordinance of the City of Rome was twenty-five miles per hour. I charge you that if you find that the defendant violated any ordinance of the City of Rome, that such a violation would be negligence *per se* — that is, negligence as a matter of law. There are other allegations of negligence made against the defendants which are contained in the petition. Now I charge you that it is a

question of fact for you to determine whether or not the defendant was guilty of such acts, and whether or not under the facts and circumstances such acts did constitute negligence at the time and place, that that is a matter for you to determine.<sup>89 1</sup>

#### Illinois.

If you decide that the plaintiff violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not the plaintiff was contributorily negligent before and at the time of the occurrence.<sup>89 2</sup>

<sup>89.1</sup> *Broome v. Matthews*, 102 GaApp 481, 116 SE2d 662 (1960).

<sup>89.2</sup> *Brewer v. Brown*, 126 IllApp 69, 261 NE2d 483 (1970)

### § 388B. — Prohibited parking.

#### Ohio.

\*\*\* If you find by a preponderance of the evidence that defendant on the date in question and at the time of this accident was parked upon one of the streets in the village of Canal Fulton, Ohio, in violation to the ordinance which the court just read to you, then in that event the defendant is negligent as a matter of law \*\*\*.

However, the defendant claims that although it violated the ordinance by parking in a prohibited zone that the action cannot be negligence because the defendant was faced with an emergency.

Well, what do we know about an emergency? Webster says this: "An emergency is a — a sudden, generally unexpected occurrence or set of circumstances, demanding immediate action."

In view of the claim of the defendant, members of the jury, you will be called upon to determine this question of whether or not there was an emergency that existed at the time of the accident involved, in this case; and in order to determine this question you may take into consideration the breakdown of the truck of this defendant, where it occurred, the moving of the truck, the place where the truck was moved, the time involved, what was done by the servants of the defendant and all other facts and circumstances of the case. And after considering the evidence on this question and you come to the conclusion then that an emergency was created, then go further and determine whether or not at the time of the accident the emergency had ceased or was permitted to continue.

If you find by a preponderance of the evidence that at the time of the accident the emergency had ceased, then as a matter of law the defendant was negligent in parking in its truck in violation of the ordinance.

If you find by a preponderance of the evidence that at the time of the accident that an emergency had existed, then the defendant had a legal excuse for parking in violation of the ordinance and the defendant would not be negligent in that particular respect.



If a person, without fault of his own, is placed in a position of a sudden emergency, the same degree of judgment and care is not required of him as is required of one who is acting under normal conditions. The test in an emergency situation is not what a reasonably careful person would do or not do under ordinary circumstances, but what a reasonably careful person might be expected to do or not do under the same or similar emergency circumstances.

Now as the court indicated the defendant claims that it had a legal excuse for the violation of this particular ordinance.

If, and only if, the sudden emergency existed will the defendant be excused from a violation of a statute or an ordinance. For a sudden emergency to exist you must first find that the defendant was confronted with an emergency; that is, a happening that could not be anticipated by the defendant, a happening that was sudden, and was not of his own making. If such occurrence could be reasonably anticipated or occurred with sufficient time to remove it from being sudden or if defendant created the emergency himself or itself, then no sudden emergency existed and the defendant is negligent for parking in a prohibited zone.

However, if you find that a sudden emergency existed, although the defendant is excused from complying with the statute or ordinance, he is still required to use ordinary care under all the facts and circumstances then existing. The danger, confusion and excitement of the situation, along with all the other facts, must be taken into consideration in determining whether ordinary care was exercised under those circumstances.

\* \* \*

If you find that a sudden emergency did exist, you should determine what the facts and circumstances were at that time; determine what the defendant did or did not do; and in the light of all these facts decide whether the defendant used ordinary care at that time. If he — or it did, then the defendant was not negligent in this respect; if the defendant did not, then it was negligent \* \* \*.<sup>5 1</sup>

<sup>5.1</sup> Pitz v. Motor Freight, Inc., 115 OhApp 280, 184 NE2d 915 (1961).

### § 391. Common-law negligence and relation to statutes.

### § 392. —Customs and usages.

Wisconsin.

Evidence has been received as to the [practice in the industry.] This evidence will be weighed and examined by you as it may bear upon whether the conduct of the defendant measures up to the standard of ordinary care. This evidence of practice is not conclusive as to what meets the required standard for ordinary care or reasonable safety. What is generally done by men engaged in a similar activity has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom cannot overcome the requirement of reasonable safety and ordinary care. A practice which is obviously

unreasonable and dangerous cannot serve to excuse a person from responsibility for carelessness. On the other hand, a custom or practice which has enjoyed a good safety record under similar conditions could aid you in determining whether or not defendant was negligent. [Wisconsin Jury Instruction — Civil 1019.]

\* \* \*

The defendant bus company as a common carrier has a duty to discharge a passenger in a place of safety . . . Although the practice is to stop at the curb, there is nothing in the law requiring the bus driver to stop his bus adjacent to the curb, nor is there any evidence that the roadway adjacent to the curb was a dangerous condition. If you find that the bus driver failed to discharge the male plaintiff in a place of safety, you must find the defendant negligent.<sup>16.1</sup>

<sup>16.1</sup> Victorson v. Milwaukee & Suburban  
Transport Co., 70 Wis2d 336, 234 NW2d 332  
(1975).

**§ 393. — Guest statutes; wilful, wanton, or reckless conduct; gross negligence.**

**Alaska.**

Plaintiffs are entitled to punitive damages if the jury finds that:

"said defendants were guilty of conduct which can be characterized as outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of plaintiffs," and the jury is instructed that: "Recklessness" is more than ordinary negligence, more than want of ordinary care, and is a wanton or heedless indifference to consequences."<sup>18.1</sup>

**Arkansas.**

To operate an automobile in wilful and wanton disregard of the rights of others is a course of conduct which involves deliberate, intentional or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. It is greater than gross negligence.

To be wilfully negligent, one must be conscious of his conduct, and, although having no intent to injure must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.

It is agreed by the parties hereto that O.L.C. was a guest in the pickup truck operated by the defendant H. Our law provides that no person transported as a guest shall have a cause of action against the operator unless the vehicle was wilfully and wantonly operated in disregard of the rights of others.

Therefore, before O.L.C. can recover in this case, she must establish by a preponderance of the evidence that her injuries received in this upset were due to some act or acts of wilful and wanton misconduct on the part of her host, the defendant, H.

You are told that even though you believe from a preponderance of the evidence that the defendant driver was guilty of gross negligence in the operation of his vehicle — that degree of negligence would not of itself entitle plaintiff O.L.C. to recover. O.L.C. must go further and show by a preponderance that H. persisted in a course of conduct which to the knowledge of an ordinarily prudent person would naturally or probably result in injury.<sup>19 1</sup>

The plaintiffs have alleged that the defendant was negligent in one or more of the following respects:

(2) failing to keep her vehicle under proper control and

(3) in operating the automobile at a speed in excess of that which was reasonable and prudent under the circumstances then existing.

You are instructed that under the laws of the state of Arkansas it was the duty of the defendant, L.S., to exercise ordinary care in the operation of her vehicle to avoid injury to others, and that a failure on her part to exercise such care would be evidence of negligence. Ordinary care requires every person who operates a motor vehicle upon a public highway to keep his or her vehicle under such control as will enable him or her to check its speed, or to stop it absolutely, if necessary to avoid injury where danger is apparent or reasonably to be anticipated by the exercise of ordinary care. Further, it was the duty of the defendant to exercise ordinary care to operate her vehicle at a speed no greater than was reasonable and prudent under the circumstances, and that a failure to do so would be evidence of negligence.

You are further instructed in that connection that the lawful maximum speed at which the defendant's vehicle might have been operated at the time and place of the accident here involved was that speed which was reasonable and prudent under the circumstances, but not to exceed 60 miles per hour in any event, and should you find that defendant's vehicle was being operated at the time and place of the accident here involved at a speed which was not reasonable and prudent under the circumstances this would be evidence of negligence to be considered along with other circumstances in the case.

\* \* \*

Now should you find from a preponderance of the evidence that the defendant, L.S., was guilty of negligence in one or more of the respects alleged by the plaintiff, as just related to you, this negligence, without more, would not entitle the plaintiffs to maintain this action, or to recover their damages, if any. As you have previously been instructed, to recover in this action, if at all, plaintiffs must prove by a preponderance of the evidence that the defendant was guilty of wilful and wanton misconduct. They must prove not only that the defendant was negligent, but also that she knew, or had reason to believe, that her act of negligence was about to inflict injury, and that she continued in this course of conduct with a conscious indifference to the consequences thereof, exhibiting a wanton disregard of the rights and safety of others.<sup>19 2</sup>

#### California.

First of all, what is the meaning of this term, "wilful misconduct" as it is used in the so-called "guest law" of this state? Wilful misconduct as it is used in this

guest law of the state of California means intentional wrongful conduct on the part of the driver which is done either with knowledge that serious injury to the guest probably will result, or with a wanton and reckless disregard of the possible results of the driver's conduct. Now when I say that the conduct in question must have been intentional, I mean only that the conduct complained of as such must have been intended. I don't mean that the result, that is, the injury to the guest, must have been intended by the driver. The only element in the defense of wilful misconduct in addition to the fact that it must have been intentionally done and wrongfully done, is that the driver must have had either knowledge that serious injury to the guest probably will result or with a wanton and reckless disregard of the possible result. It is therefore possible that a driver could be guilty of wilful misconduct without having intended to injure the guest or anyone else.<sup>25 1</sup>

A person who, having a guest in the motor vehicle which he drives, drives the vehicle at a speed which, in the attendant circumstances, is excessive or reckless or violates some traffic law, can be guilty of wilful misconduct only if, in so driving he has within his own mind knowledge that serious injury to his guest probably will result, or he so acts with a wanton and reckless disregard of the possible results.

\* \* \*

But violating a traffic law, such as running through a boulevard stop sign or driving at an excessive speed, does not, of itself alone, constitute wilful misconduct; it merely raises a presumption of negligence.

\* \* \*

The words "wilful misconduct" have a meaning in the law in addition to that which they have in common usage. If we were to use the words in their ordinary sense, they would mean simply the indulging in wrongful conduct by conscious choice. Such conduct might consist of doing something that ought not to be done or in failing to do something that ought to be done. But in order to be a basis for liability to a guest under our law, the misconduct must be done under circumstances which show either knowledge that serious injury to the guest probably will result, or a wanton and reckless disregard of the possible results.

\* \* \*

You will note from the definition just given that a driver can be guilty of wilful misconduct without intending to injure his guest or anyone.

\* \* \*

You will also note from the foregoing that wilful misconduct is not the same as negligence, or even what might be called gross negligence. A guest may not recover against the host-driver for negligence, however it might be classified, but only for wilful misconduct (as defined in these instructions), and that means intentional, wrongful conduct, done either with knowledge that serious

injury to the guest probably will result, or with a wanton and reckless disregard of the possible results

\* \* \*

When there is a question whether a vehicle driver conducted himself with knowledge that serious injury to a guest probably would result from his conduct, proof of such knowledge does not have to be by direct evidence. The jury has a right to INFER that within his own mind the driver had such knowledge, if such an inference may reasonably be drawn from facts in evidence, and if the judgment of the jury so directs.

\* \* \*

Although you should find that R. P. was negligent and that he intentionally did something that was wrongful and which was a proximate cause of the death of R. H. and B. H., still plaintiff is not entitled to recover unless you further find that R. P.'s conduct was done either with knowledge that serious injury probably would result or with a wanton and reckless disregard of the possible results.<sup>25 2</sup>

#### Georgia.

The court in its charge defined the term and instructed the jury as to what constitutes gross negligence, and instructed them that unless they found that the defendant was grossly negligent it would be their duty to return a verdict in favor of the defendant; that they would consider only such gross negligence as they found to have been the proximate cause of the plaintiff's injury and damages; and that, if they found gross negligence but found that it did not contribute to the damages, their verdict should be for the defendant.<sup>28 1</sup>

#### Idaho.

With respect to the defendant, S., this action is brought by the plaintiffs under the provisions of Section 49-1401 of the Idaho Code, which reads as follows:

"No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by \* \* \* his reckless disregard of the rights of others."

\* \* \*

You are instructed that the term "reckless disregard" of the rights of others is defined as follows:

"The term 'reckless disregard' means an act or conduct destitute of heed or concern for consequences; especially foolishly heedless of danger, head-long rash, wanton disregard, or conscious indifference to consequences. This implies a consciousness of danger and a willingness to assume the risk, or reckless disregard to consequences."

You are instructed that M. S. was riding in the automobile of M. K. S. as a guest. Therefore, in order for you to find for the plaintiffs and against the defendant S., you must find from a preponderance of the evidence that the conduct of the defendant M. K. S. was in reckless disregard of the rights of others, as in the preceding instruction defined for you.<sup>29 1</sup>

#### Indiana.

In evaluating guest cases, our courts have laid down certain guidelines for the trial courts to follow:

1. An error of judgment or a mistake standing alone, on the part of the host, will not amount to wanton or wilful misconduct.

2. The host must have manifested an attitude adverse to the guest, or of "perverseness," in that the host must have shown he was indifferent to the consequences of his conduct.

3. The entire course of conduct of the host leading up to the accident must be considered.

4. If the circumstances are such that reasonable men would know and conclude that their conduct under such circumstances entailed a probability of injury, then the host is chargeable with such knowledge.<sup>31 1</sup>

#### Montana.

You are hereby instructed that since the accident in this case occurred in the state of Montana that the substantive law of that state must apply.

\* \* \*

You are hereby instructed that at the time and place of the accident here in question, the following Montana Code section was in full force and effect:

"32-1114. (1748.2) Assumption of risk by guest in motor vehicle, when. Any person riding in a motor vehicle as a guest or by invitation and not for hire, assumes as between owner and guest the ordinary negligence of the owner or operator of such motor vehicle."

You are hereby instructed that at the time and place of the accident here in question, the following Montana Code section was in full force and effect:

"32-1115. (1748.3) Imputation of ordinary negligence to guest. The ordinary negligence of the owner or operator of a motor vehicle as between owner and guest is imputed to any person riding in such vehicle as a guest or by invitation and not for hire."

You are hereby instructed that "gross negligence" and "reckless operation" are variously defined by different courts. Most, if not all, of them are of little assistance in the classification of various states of facts within or without such definition. Under the construction of this statute herein announced, whether "gross negligence" and "reckless operation" are synonymous or said to be different in meaning one from the other is immaterial, for if the conduct of the driver of the automobile was in fact something more than ordinary negligence, it matters not, under the act in question, by what means it may be described; the defendant is nevertheless liable.

Ordinary negligence is the doing of that which an ordinarily prudent person would not have done, or the omission to do that which an ordinarily prudent person would have done.

In this case, the defendant, S. R. M., Jr., is charged with grossly negligent and reckless operation of the car. Any negligence in excess of ordinary negligence is sufficient on the part of the said defendant, S. R. M., Jr., to sustain a verdict in favor of the plaintiff.

You are instructed that in an ordinary negligence case involving the operation of a motor vehicle on a public highway, the plaintiff is obliged to prove only that he was injured by the failure of the operator of the motor vehicle involved to use ordinary care. In this case, however, the plaintiff assumes the ordinary negligence of the owner and operator of the motor vehicle. The plaintiff in this case cannot recover against the owner or operator unless he has first proved by a preponderance of the evidence that the operator was guilty of something more than a failure to use ordinary care which proximately caused his injury, if any.

You are instructed that it is not sufficient for the plaintiff to prove that the operator of the motor vehicle involved was guilty of ordinary negligence; and unless the plaintiff in this case proves by a preponderance of the evidence that S. R. M., Jr., operated the vehicle in a grossly negligent and reckless manner, and that such gross negligence and recklessness was the proximate cause of the accident, your verdict must be for the defendant.

\* \* \*

You are instructed that ordinary negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. Gross negligence is something more than ordinary negligence; by gross negligence is meant an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a heedless disregard of the consequences as affecting the life or property of another, and also implies a heedless disregard of the consequences without the exercise of any effort to avoid them. In order to recover, plaintiff must prove by a preponderance of the evidence something more than mere speed, or an error in judgment, or momentary inattentions, or loss of presence of mind.<sup>33 1</sup>

<sup>18.1</sup> Clary Ins. Agency v. Doyle, 620 P2d 194 (Alaska 1980)

<sup>19.1</sup> Harkrider v. Cox, 232 Ark 165, 334 SW2d 875 (1960).

<sup>19.2</sup> Spence v. Vaught, 236 Ark 509, 367 SW2d 238 (1963).

<sup>25.1</sup> Conway v. Gurney, 181 CalApp2d 239, 5 CalRptr 248 (1960).

<sup>25.2</sup> Hop v. Waters, 219 CalApp2d 62, 32 CalRptr 786 (1963).

<sup>28.1</sup> French v. Stephens, 117 GaApp 61, 159 SE2d 484 (1967)

<sup>29.1</sup> Smith v. Sharp, 85 Idaho 17, 375 P2d 184 (1962).

<sup>31.1</sup> Fielitz v. Allred, — Ind —, 364 NE2d 786 (1977).

<sup>33.1</sup> Philpott v. Mitchell, 219 CalApp2d 244, 32 CalRptr 911 (1963).

**§ 395. —Who is a guest under guest statutes.****California.**

Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the rider's transportation, the rider is a passenger, not a guest.

The compensation required to make a person a passenger, rather than a guest, need not be in money and need not be paid directly by such person. If, as a chief inducement for the transportation, any benefit is conferred on the driver which has a then present pecuniary value although that value may never ripen into material gain, the person transported is a passenger, not a guest. One who thus rides and pays or agrees to pay is a passenger.<sup>53 1</sup>

<sup>53 1</sup> *Quicksall v. Levy*, 217 CalApp2d 599, 31 CalRptr 702 (1963)

**§ 396. —Contributory negligence of passenger; in general.****Georgia.**

I charge you further, gentlemen, that the plaintiff, Mrs. M., was under a duty to exercise ordinary care for her safety, even though she was not the driver of the automobile, and in this connection I charge you that if the approach of the B. automobile was visible to Mrs. M., I charge you that you should consider whether or not she exercised ordinary care for her own safety in not warning her husband of the approach of the B. automobile. However, should you find by a preponderance of evidence that the defendant was negligent in one or more of the particular grounds of negligence, as alleged, and such negligence, if any, was the proximate cause or a contributing cause entering into the proximate cause of the injury sustained by the plaintiff, whatever you find they were, you would find your verdict for the plaintiff, provided she is not precluded from a recovery under other rules of law given you in this charge.<sup>55 1</sup>

**Indiana.**

You are instructed that in determining whether or not the plaintiff was guilty of contributory negligence, you shall consider her own acts and conduct, and all the other circumstances surrounding the accident and injury, if any, to the plaintiff. And if you shall find from a preponderance of the evidence in this cause that the plaintiff acted as a person of ordinary prudence under all the circumstances, you should find her free from contributory negligence, even though you may find that her husband was guilty of negligence in the operation of his truck. In other words, the negligence, if any, of the husband in the driving and management of said truck cannot be imputed to the plaintiff if you find that she herself was free from any fault or negligence and was merely the passive guest of her husband without any authority to direct or control the operation of said vehicle.



\* \* \*

I instruct you that a person who is a passenger in an automobile has a duty to use that degree of care that an ordinarily prudent person, in like circumstances, would use under the same or similar conditions. Therefore, if you find by a preponderance of the evidence that the plaintiff failed to exercise that degree of care that an ordinarily prudent person, in like circumstances would have exercised under the same or similar conditions and if you find that failure on her part proximately contributed to her own injuries, then I instruct you that the plaintiff cannot recover in this case and it will be your duty to return a verdict for the defendants.<sup>56.1</sup>

<sup>55.1</sup> Slaton v. Parker Heating Co., 107 GaApp 649, 131 SE2d 199 (1963).

<sup>56.1</sup> Southern Indiana Gas & Elec. Co. v. Bone, 135 IndApp 531, 180 NE2d 375 (1962)

**§ 397. —Imputed negligence; joint enterprise.<sup>58.1</sup>**

**California.**

The vehicle in which plaintiff, C. R., was riding at the time of the accident in question was then being operated by W. K., and plaintiff was merely a guest.

You are instructed that the driver's negligence, if any, may not be imputed to the plaintiff, C. R., and that, therefore, you should find that there was no contributory negligence on the part of the plaintiff.

When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently and as proximate causes to the injury of another, each of such persons is liable.

This is true regardless of the relative degree of the contribution. It is no defense of the defendant, C. E. W., that W. K., not joined as a defendant in this action, participated in causing the injury, even if it should appear to you that W. K. was negligent, or even if it should appear to you that the negligence of W. K. was greater in either its wrongful nature or effect.

The law does not require that the negligence of defendant, C. E. W., must be the sole cause of the injury complained of in order to entitle the plaintiff to damages therefor. All that is required in either respect is that the negligence in question shall be a proximate cause of the injury complained of.<sup>63.1</sup>

**Florida.**

With respect to her (the wife's) claim, if the greater weight of the evidence should not support that claim against the defendants, your verdict, of course, should be for the defendants. However, if the greater weight of the evidence supports her claim of negligence on the part of the defendant driver then your verdict should be for her and against the defendants; and even if you should find negligence, also on the part of her husband as driver, this is not imputed to her.<sup>65.1</sup>

**Georgia.**

I further charge you that if you find in this case now on trial that the son of the plaintiff was acting under her direction and control and in and about her business, then and in that event, any negligence, if you should find negligence on the part of the son, would be imputable to the plaintiff, just as though she had committed the acts of negligence herself.<sup>67.1</sup>

**Indiana.**

You are further instructed that if you find from a fair preponderance of the evidence that the husband of the plaintiff was driving the automobile in which she was riding as her agent at the time of the accident, and at the time the plaintiff received her injuries, if you find she was injured, that it was the duty of plaintiff's husband as he proceeded east on Normandy Pike to keep a lookout for vehicles on the Mary Hamm Road, and if at said time plaintiff's husband did not exercise due care and thereby contributed to, or was the proximate cause of said accident and injuries sustained by plaintiff, then in that event the plaintiff would not be entitled to recover against defendant and your verdict should in that event be for the defendant.<sup>72.1</sup>

**Mississippi.**

The court instructs the jury for the plaintiff, Mrs. L. W., that if you believe from the evidence in this case that she was an invited guest in the automobile of Mrs. R. and that she had no control or legal right of control of either the automobile or the driver thereof, then under the law, the negligence, if any, of Mrs. R., the driver of said automobile, cannot be imputed to Mrs. L. W.<sup>79.1</sup>

**Nebraska.**

... [I]n order to recover under the family purpose doctrine, four essential elements must be proved: "(1) that the defendant who is sought to be charged with liability was the head of his family, (2) that he furnished the car for the use and pleasure of his family, (3) that the driver of the automobile was a member of his family and one for whose use or pleasure the car was furnished, and (4) that the driver was, at the time of the accident, using the car for which it was furnished with the authority, expressed or implied, of the head of the family."<sup>82.1</sup>

**Oregon.**

Now in connection with this question of negligence, you are instructed that B., the driver of the automobile in which plaintiff was a passenger, was also under a duty to operate her car at a reasonable rate of speed and to maintain a proper lookout and to keep her automobile under proper control, as I have defined those terms for you, and therefore if you should find from the evidence in this case that B., the driver of the automobile in which the plaintiff was a passenger, was negligent and that such negligence on her part was the sole

proximate cause of the accident, then plaintiff cannot recover and your verdict should be for the defendants. In other words, if you should find from the evidence in this case that B. was solely and entirely at fault for the happening of this accident the plaintiff is not entitled to prevail and recover from the defendants. However, if you should find from the evidence in this case that the defendant P. was negligent in one or more of the particulars as set forth in plaintiff's complaint and that such negligence, if any, concurred or combined jointly with the negligence of B., if any, as the proximate cause of the accident, you should return your verdict in favor of the plaintiff providing she sustained injuries and damages as a proximate result thereof, because the negligence, if any, of B., the driver of the automobile in which plaintiff was a passenger, cannot be imputed or charged against this plaintiff.<sup>88 1</sup>

#### Tennessee.

However, if a driver is proceeding at a lawful and proper rate of speed and is driving in a prudent and proper manner, the guest may rely upon the fact that he will so continue; and if the driver suddenly commits some act of negligence before the guest has time to protest or give warning, then that act of negligence on the part of the driver may not be imputable to the guest.<sup>89 1</sup>

<sup>58.1</sup> See also Imputed Negligence, Ch 110, Vol 3.

<sup>63.1</sup> *Ross v Wilcox*, 190 CalApp2d 213, 11 CalRptr 588 (1961).

<sup>65.1</sup> *Hammack v Veillette* (FlaApp), 233 S2d 836 (1970)

<sup>67.1</sup> *Cornett v. McWaters*, 101 GaApp 120, 112 SE2d 797 (1960).

<sup>72.1</sup> *Automobile Underwriters, Inc. v. Smith*,

131 IndApp 454, 166 NE2d 341 (1960).

<sup>79.1</sup> *Walker v Ferris*, 241 Miss 63, 128 S2d 865 (1961)

<sup>82.1</sup> *Ramsey v Rimpley*, 196 Neb 516, 244 NW2d 78 (1976)

<sup>86.1</sup> *Wills v Petros*, 225 Or 122, 357 P2d 394 (1960)

<sup>89.1</sup> *Bray v Harwell*, 50 TennApp 143, 360 SW2d 58 (1962)

#### § 401. —Intoxication of operator.

##### Missouri.

The court instructs the jury that if you find and believe from the evidence that on the occasion mentioned in evidence G. T. H. was the owner of the automobile involved in the casualty described in evidence and if you further find and believe from the evidence that on the evening of April 17, 1957, W. C. had been drinking intoxicating liquors and by reason thereof, his ability to prudently drive an automobile was impaired, if you so find, and if you further find that G. T. H. knew or in the exercise of ordinary care for his own safety, should have known of the aforesaid facts, if you find them to be facts, and that thereafter G. T. H. carelessly and negligently allowed and permitted W. C. to drive his automobile, if so, and if you find that G. T. H. carelessly and negligently rode in said automobile while same was being driven by W. C., if so, and if you further find that said automobile was thereafter operated by W. C. west on Commerce Street at a high and dangerous rate of speed under all of the facts and circumstances then and there existing, if so, and that G. T. H. negligently failed to timely protest to W. C. about the manner and speed at which said automobile was being operated, if so, and negligently failed to take any affir-

mative action to influence the manner in which said automobile was being operated by W. C., if so, and if you further find that the aforesaid negligence, if any, of G. T. H. directly caused or directly contributed to cause the death of G. T. H., then your verdict must be for the defendant.<sup>24 1</sup>

#### Oregon.

Now, the defendant in this case interposes a defense, as I told you, of assumption of the risk. When a person, whether a guest or a passenger, enters a vehicle knowing that the one who is operating the vehicle is intoxicated, sleepy or generally physically unfit to the extent that he is unfit to operate the vehicle, he assumed the hazards involved and may not recover if injury results from such condition of the driver.<sup>24 2</sup>

The following is error when given with another on contributory negligence:

Now, the Defendant L. in this case has also interposed the defense of the assumption of risk. When a person, whether a guest or a passenger, enters a vehicle knowing the one who is operating the vehicle is intoxicated, or unfit to operate the automobile, the guest or passenger assumes the risks involved and may not recover if injury results from such condition of the driver.

One may not negligently blind himself to the obvious signs of danger and then say he was unaware of the danger, if a passenger should have reason to know of the driver's inability to drive safely the passenger will be barred if he then accepts the ride, fails to remonstrate and get out of the vehicle.<sup>24 3</sup>

<sup>24.1</sup> Hopper v. Conrow (Mo), 347 SW2d 896 (1961)

<sup>24.3</sup> McIntosh v. Lawrence, 255 Or 569, 469 P2d 628 (1970).

<sup>24.2</sup> Quigley v. Roath, 227 Or 336, 362 P2d 328 (1961). The action was under the Idaho guest statute.

### § 408. —Passenger's use of faculties to discover dangers and to warn operator.

#### Oklahoma.

You are further instructed that a guest passenger in an automobile is obliged to use ordinary care and caution in preserving his own safety and to this end, as such passenger in an automobile is obliged to keep a reasonable lookout for approaching danger and to warn the driver of an automobile in which he is riding with reference to approaching dangers, and if it appears to a passenger, or by the exercise of ordinary care, should appear that the driver of the automobile is operating the vehicle in a negligent manner, it is the duty of the passenger to warn the driver of such vehicle and to remonstrate with the driver in regard to such method of operation, and it would be negligence on the part of such passenger to fail to do so.<sup>39.1</sup>

<sup>39.1</sup> Missouri-Kansas-Texas R. Co. v. Harper (Ok), 468 P2d 1014 (1970).

**§ 411A. Passengers; duty of care.****Minnesota.**

A passenger has a duty to use reasonable care for his own safety when riding in the vehicle of another.

The law presumes that at the time of the accident the decedent was using reasonable care for her own safety. Thus, if you find that there is no evidence to the contrary, you must find that the decedent was using reasonable care.<sup>65.1</sup>

<sup>65.1</sup> Jones v. Peterson, 279 Minn 241, 156 NW2d 733 (1968).

**§ 413. Contributory and imputed negligence of absent owner in action for damage to his vehicle.****Alabama.**

The court instructs you that if you are reasonably satisfied from the evidence in this case that the plaintiff, Mrs. K., was riding as a passenger in an automobile being driven by Mrs. P., and that the plaintiff had no right of control over the driver, then no negligence on the part of the driver, Mrs. P., if there was any, would constitute a defense to the right of the plaintiff, Mrs. K., to recover in this case if she is otherwise entitled to recover.<sup>67.1</sup>

**Florida.**

Under the law of Florida, the acts of a driver who is agent for another are imputed or charged to that other person, who is known as the principal. Where an owner entrusts his automobile to another person to drive, then the negligence of that driver, in this case B.L.C., is imputed to the owner. Therefore, if you find that B.L.C. was in any appreciable degree negligent at the time and place of the accident, and that her negligence was a proximate contributing cause to the accident, then the plaintiff F.D.C. [owner] may not recover in this action against the defendants.

\* \* \*

If you should find from all the evidence that at the time and place of the accident the driver of the plaintiff's vehicle, B.L.C., was acting as the agent for the plaintiffs Mr. and Mrs. C., then and in that event the negligence, if any, of B.L.C. would be imputed to the plaintiff Mrs. C. If you should find from all the evidence that the negligence, if any, of B.L.C. was a proximate contributing cause of this accident, and that at such time and place B.L.C. was the agent of the plaintiff Mrs. C., then and in that event neither plaintiff can recover.<sup>67.2</sup>

<sup>67.1</sup> Atlantic Coast Line R. Co. v. Kines, 276 Ala 253, 160 S2d 869 (1963).

<sup>67.2</sup> Shelmark Land Corp. v. Zayas (FlaApp), 158 S2d 555 (1963).

### § 414. Injuries to pedestrians in general.

#### Arizona.

You are instructed that the owner of an automobile has the right to use the highways of the state provided, in using them, he uses reasonable care and caution for the safety of others. It is the operator's duty to keep his motor vehicle always under control so as to avoid a collision with others using the highway and he has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others. And if he fails to use such reasonable care and caution and thereby injures another such failure on his part would constitute negligence and he would be liable in damages for any injury proximately caused by his negligence.

You are instructed that pedestrians have a right to travel upon a public highway and an automobile driver is required to drive carefully to prevent danger to others using the highway. The driver has no right to assume that the road is clear but under all circumstances and at all times must be vigilant and must anticipate the presence of others and keep his machine under such control as will enable him to avoid collision with other persons using proper care and caution.

\* \* \*

The law imposes upon the driver of any vehicle using a public highway and upon a pedestrian, the same duty, each to exercise ordinary care to avoid causing an accident from which injury might result. The pedestrian's duty includes exercising ordinary care to avoid placing himself in danger. The driver's duty requires him to be vigilant at all times keeping a lookout for traffic and other conditions to be reasonably anticipated, and to keep the vehicle under such control that, to avoid a collision with any person, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinary prudent driver in like position.<sup>74 1</sup>

#### Maryland.

On the issue of police officer-plaintiffs contributory negligence, these instructions were not erroneous:

"As I said, this is not strictly a pedestrian case. \* \* \* The Officer, of course, must keep a reasonable lookout for traffic and accommodate himself to the movement of the traffic under the circumstances and he may not just ignore it. Likewise the motorist must be vigilant also as to the traffic in the street in front of him. I suppose, as far as the pedestrian is concerned, in the average case at least, as distinguishing from a police officer, his main objective is his own safety. The police officer, of course, is in the performance of his duty. In that connection safety is not always the sole factor. The police officer must exercise reasonable care to preserve his safety and, as I have said before, [the] traveling public must be equally diligent and exercise reasonable care to avoid injury to him or endangering his life and limb. In other words, I think you can boil it down to this: A police officer's legal duty is to keep a reasonable lookout and

to exercise care in the circumstances commensurate with the dangers and consistent with his faithful performance of the duties of his employment as a police officer.”<sup>93 1</sup>

#### Minnesota.

In this case it is admitted that the defendant, The D Company, operated a parking ramp pursuant to a license for such operation granted to it by the City of St. Paul. In return for the right to operate this ramp and make such use of the public sidewalk as it does, that defendant incurs certain responsibilities. The defendant, its managers and employees, are under an affirmative duty to exercise ordinary and reasonable care to protect the safety of those pedestrians using the public sidewalk adjacent to their parking ramp. As a part of such duty there is imposed upon the defendant the responsibility of taking reasonable precautions to prevent those acts which, in connection with its operation, the defendant ought, in the exercise of ordinary care, to anticipate or foresee will likely occur and which are liable to result in injuries to those to whom the defendant owes the duty.

Thus, in determining whether or not the defendant, The D Company, breached the duty which it owed to those using the public sidewalk, you may, among others, consider the factors of what acts, if any, should reasonably have been anticipated by this defendant and what, if any, precautions should reasonably have been taken by this defendant in anticipation of acts or occurrences that should reasonably have been anticipated.<sup>93 2</sup>

#### Ohio.

As a matter of law, if you find from all the evidence in this case that plaintiff was guilty of negligence which directly and proximately contributed in the slightest degree to bring about the accident and injuries of which plaintiff complains, there can be no recovery for this plaintiff; and members of the jury, this is true even if you further find, from the greater weight of all the evidence, that the defendant was also guilty of negligence which directly and proximately contributed to the accident of which the plaintiff complains, and your verdict, if you so find, should be for the defendant.<sup>99 1</sup>

<sup>74.1</sup> Young Candy & Tobacco Co. v. Montoya, 91 Ariz 363, 372 P2d 703 (1962).

<sup>83.1</sup> Clayborne v. Mueller, 266 Md 30, 291 A2d 443 (1972).

<sup>93.2</sup> DeWitt v. Schuhbauer, 287 Minn 279, 177 NW2d 790 (1970).

<sup>99.1</sup> Phillips v. Barker, 87 OLA 393, 180 NE2d 180 (1959).

### § 415. —Crossing street or highway.

#### California.

Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him; to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passage; and to try to

make a sensible decision whether it is reasonably safe to attempt the crossing. What observations he should make, and what he should do for his own safety, while crossing the street are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect: It does place upon him the continuing duty to exercise ordinary care to avoid an accident.<sup>26 1</sup>

#### Indiana.

The court instructs you that it was the duty of the plaintiff, E.M., in walking from the south side to the north side of Court Street at the time and place complained of, to exercise caution commensurate with the known dangers thereof, if any. He was bound to know that automobiles or other vehicles might be traveling upon said street and exercise due care accordingly, and if you find from the evidence that the plaintiff, E.M., went upon said street and if he had made reasonable use of his sight and hearing by looking and listening for vehicles at a place where he could have seen or heard a vehicle approaching him, if you find that there was such a place, and that such precautions were reasonable under the circumstances and were such as an ordinary prudent person would have used in the exercise of reasonable care for his own safety under the circumstances, then the plaintiff, E.M., was bound to do so, and if he failed to take such precautions and in consequences of such failure was injured, then under such circumstances the plaintiff cannot recover in this action and your verdict should be for the defendant.<sup>31 1</sup>

#### Iowa.

Even though a pedestrian in a crosswalk has the right of way over an approaching motorist when there is danger of collision, the pedestrian still must exercise ordinary care and caution to avoid a collision with a motor vehicle when there is danger of a collision.

A pedestrian's failure to exercise such ordinary care and caution constitutes negligence.<sup>33 1</sup>

#### Michigan.

It is Mrs. A's., the plaintiff's claim, that on this day, the 26th day of September, 19—, that she came out of her motion picture theater; and that she came down to the corner to the west and started crossing the street to the north. That she looked both ways and proceeded across, and was hit by the defendants in this case, D. G. and his wife M. G. That D. G. was driving the car; and she claims that she was hit upon the south side of the street, which runs east and west, in the south lane of the street; and that she was acting with due care. And she claims the defendant, Mr. G., drove his car over on the south side, or on which would be the wrong side of the street, and hit her. Mrs. A. claims that she is free from negligence; and that the defendant, Mr. G., is guilty of negligence which contributed to this accident.

The plaintiff claims also that the defendant was negligent in that he was not able to stop his car within the assured clear distance ahead. That he drove on the wrong side of the road. He did not sound his horn, nor have good brakes. These are the negligence claims on the part of the plaintiff.<sup>45.1</sup>



**Minnesota.**

The driver of a vehicle upon a through highway who is approaching an intersection knowing that it is protected by yield the right of way signs, may assume until he sees or should see otherwise that the driver approaching intersection on the intersecting highway will respect the right of way and obey the law.<sup>46 1</sup>

**Nevada.**

On August 27, 1966, there was in force in the City of Reno, State of Nevada, an Ordinance, the pertinent parts of which read as follows:

Section 10-122. Pedestrians' Right of Way in Cross Walks.

(a) When traffic-control signals are in place and in operation, or not in place, or not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be, to so yield to a pedestrian crossing the roadway within a cross walk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

(b) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.

(d) Whenever a vehicle is stopped at a marked cross walk or at any unmarked cross walk at an intersection, to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.<sup>53 1</sup>

**North Dakota.**

The instruction as given by the trial court, that "a pedestrian must exercise ordinary care at all times in crossing a street, whether crossing at a crosswalk or at any other point on the street," while technically correct, could well have misled the jury into concluding that no greater diligence or caution was required of the plaintiff in exercising ordinary care while crossing in the middle of the block than would be required of her when crossing at a pedestrian crossing. The court therefore erred in not relating the degree of caution to the circumstances.<sup>60 1</sup>

**Ohio.**

If you find by a preponderance of the evidence that the plaintiff before she started across Cleveland Avenue, believed or had the right to believe, in the exercise of ordinary care, that it was safe to cross the street, then I instruct you that she had the right to start across and it was not essential that she constantly watch for approaching vehicles as she proceeded across Cleveland Avenue.<sup>64.1</sup>

If you find from a preponderance of the evidence that plaintiff entered the crosswalk from the island in Fifth Street on a "WALK" signal, I instruct you that, as a matter of law, the defendant in operating his motor vehicle

southwardly on Walnut Street and changing its course to eastwardly on Fifth Street, was required to yield the right of way to plaintiff.<sup>64 2</sup>

**Oregon.**

I instruct you that it is the duty of the driver of a motor vehicle approaching a pedestrian lane to observe whether pedestrians are crossing thereon, and if so, to give them an opportunity to pass in safety, and if necessary for their protection, to check the speed of his car or even stop and wait until all danger of injuring any pedestrian is past.

The plaintiff alleges that the defendant driver was negligent in failing to keep a lookout for persons crossing said Southeast 39th Avenue, and particularly for the person of said deceased. In this connection I instruct you that it was the duty of the defendant to maintain, that is, the defendant driver to maintain, a reasonably constant lookout upon the highway for pedestrians and other vehicles; that is such a lookout as a reasonably prudent person would keep and maintain under the circumstances disclosed by the evidence. This means not only to look but it means to see and observe that which a reasonably prudent driver would have seen and observed under the circumstances disclosed by the evidence.

\* \* \* I instruct you when traffic control signals, if any, are not in operation a driver of a vehicle shall stop and yield the right of way to a pedestrian crossing the roadway within any marked cross walk or within any unmarked cross walk at an intersection if the pedestrian is on the half of the roadway on and along which the vehicle is travelling or is approaching such half from the other half of the roadway so closely as to be in danger.<sup>72 1</sup>

It is provided by statute of this state that every pedestrian crossing a roadway at any other place than within the marked or unmarked crosswalk shall yield the right of way to vehicles upon the roadway.

This section does not relieve the driver of a vehicle or a pedestrian from the duties to exercise due care.

You are instructed that any violation of this rule of the road would be negligence *per se* or negligence in and of itself.

In connection with the foregoing rule of the road where the pedestrian crosses at any place other than a marked or unmarked crosswalk, the law requires him to yield the right of way to all vehicles on the roadway so near as to constitute an immediate hazard, although this requirement does not relieve the driver of a vehicle from the duty to exercise ordinary care for the safety of any pedestrian on a roadway. The amount of caution required to constitute ordinary care increases or decreases as the danger that a reasonably prudent person in like position would apprehend in a situation. You may ask yourself the question, "When is a vehicle so near a pedestrian as to be an immediate hazard?" The answer is that the vehicle is that near whenever if a reasonably prudent person were in the pedestrian's position and acting as a reasonably prudent person, he would apprehend the probability of an accident were he then to attempt crossing the path of the approaching vehicle. Did the pedestrian, acting as a reasonably prudent person, find, if he did so find, the automobile approaching within such distance as to reasonably indicate danger of collision? If he did so, then the car was so near as to constitute an immediate hazard.<sup>72 2</sup>

<sup>26.1</sup> Perrotti v. Sampson, 188 CalApp2d 238, 10 CalRptr 372 (1961).

<sup>31.1</sup> Montgomery v. Gerteisen, 135 IndApp 633, 2 IndDec 642, 195 NE2d 868 (1964).

<sup>33.1</sup> Van Treese v. Holloway (Ia), 234 NW2d 876 (1975).

<sup>45.1</sup> Gibbs v. Guild, 332 Mich 671, 52 NW2d 542 (1952).

<sup>46.1</sup> Koenigs v. Werner, 269 Minn 530, 134 NW2d 301 (1964).

<sup>53.1</sup> Quillian v. Mathews, 86 Nev 200, 467 P2d 111 (1970).

<sup>60.1</sup> Glatt v. Feist (ND), 156 NW2d 819 (1968).

<sup>64.1</sup> Hardy v. Crabbe, 114 OhApp 218, 181 NE2d 483 (1961).

<sup>64.2</sup> Kellar v. Ross, 120 OhApp 383, 195 NE2d 127 (1963).

<sup>72.1</sup> Cederoth v. Cowles, 224 Or 403, 356 P2d 542 (1960).

<sup>72.2</sup> Harr v. Olson, 228 Or 504, 364 P2d 1013 (1961).

## § 416. —Walking along street or highway.

### Wisconsin.

You are instructed that it is the duty of every pedestrian to use ordinary care for his own safety when crossing or using a highway intended for use of vehicular traffic. The law requires that he must exercise a reasonably efficient lookout for vehicles as the term lookout has heretofore been explained. He must also exercise reasonable care not to place himself in a position of danger, that is or ought in the exercise of reasonable care to be apparent to him.<sup>12 1</sup>

<sup>12.1</sup> Gilberg v. Tisdale, 13 Wis2d 249, 108 NW2d 515 (1961).

## § 417. —On sidewalk.

### Missouri.

The court instructs the jury that on the occasion mentioned in evidence plaintiff was required to exercise ordinary care for her own safety, that is, such care as would be used by an ordinarily careful and prudent person under the same or similar circumstances; and a failure on her part to exercise such care would constitute negligence on her part.

In this connection the court further instructs you that if you find and believe from the evidence that on the occasion mentioned in evidence plaintiff was on the east sidewalk of Twelfth Street in the City of St. Louis, and in or in close proximity to a driveway or alley which crossed said sidewalk immediately south of the Board of Election Commissioners Building, and that defendant operated his automobile generally eastwardly on said driveway and partly into the intersection of the alley and the sidewalk and stopped; and if you further find that the defendant then slowly approached and started to pass behind plaintiff, and that plaintiff, without looking back, moved backward and into and against the side of the left front fender of defendant's automobile, and was thereby caused to fall to the sidewalk or driveway; and if you further find and believe that, under all the circumstances there existing, in so stepping backward plaintiff failed to exercise ordinary care for her own safety and was negligent, and that such negligence, if any, on plaintiff's part directly contributed to cause her to fall and be injured, then the court instructs you that you cannot find for plaintiff under Instruction No. 1, and you should find the issues under that instruction in favor of the defendant.<sup>17 1</sup>

**Pennsylvania.**

I charge you that under the evidence if you find that defendant's bus swerved and either mounted the sidewalk or came so close to the sidewalk as to strike plaintiff and her injuries resulted thereby, then if you so find you may find such conduct on the part of the bus driver to be negligence and you may further find that it was negligence not foreseeable by the plaintiff, located as she was and that this negligence rendered unsafe the bus that was otherwise safe and lawful for the plaintiff, that then the plaintiff would not be guilty of contributory negligence.<sup>17 2</sup>

<sup>17.1</sup> Timmons v. Kulpatrik (Mo), 332 SW2d 918 (1960)

<sup>17.2</sup> Auerbach v. Philadelphia Transp. Co., 421 Pa 594, 221 A2d 163 (1966).

**§ 420. Injuries to intoxicated persons.****Wisconsin.**

If you find from the greater weight of the credible evidence to a reasonable certainty that just before the accident N. G. was lying on the roadway in an immobile position in the normal path of vehicles lawfully using the highway at the time and place in question, you may infer from this fact and the accident and injury and the surrounding circumstances that N. G. was negligent as to her own safety unless she has offered a satisfactory explanation of her position on the highway.<sup>26 1</sup>

<sup>26.1</sup> Gilberg v Tisdale, 13 Wis2d 249, 108 NW2d 515 (1961)

**§ 422. Injuries to persons having defective sight.****Pennsylvania.**

. . . [H]e is bound to use due care under the circumstances and due care for a blind man includes a reasonable effort to compensate for his unfortunate affliction by the use of artificial aids for discerning obstacles in his path. It is not negligence per se for a blind person to go unattended on a sidewalk of a city, but he does so at great risk and must always have in mind his own disadvantage and do what a reasonably prudent person in his situation would do to ward off danger and prevent accidents. He is not bound to anticipate an open ditch but should take precautions to discover possible barriers. In the exercise of due care it is his duty to use a common, well-known compensatory device for blind people, such as a cane, a seeing eye dog or a companion. The fact that the plaintiff, or a plaintiff's deceased, had impaired vision does not increase defendant's duty toward him nor excuse him from his own negligence. If the individual knows that he is physically inferior in any particular, he is required to use his remaining faculties with greater diligence.<sup>30.1</sup>

<sup>30.1</sup> *Argo v Goodstein*, 438 Pa 468, 265 A2d 783 (1970).

#### § 424. Injuries to children in general.

##### Idaho.

You are instructed that a child of the age (5 years) of P. M. is ordinarily presumed by law to be incapable of negligence. However, though age is an important factor to be considered in determining whether or not a child is capable of exercising care on its own part, it is not the only factor to be considered. The capacity, discretion, knowledge and experience of the particular child are predominant elements in determining the question of the child's negligence, and intelligence rather than age is the controlling test in determining the degree of care required of a child to avoid personal injury. In other words, the child is chargeable with that degree of care reasonably proportionate to a child his age and capacity.

Whether or not P. M. was contributorily negligent as in these instructions defined, must, by you be determined from all of the particular facts and circumstances surrounding the accident in question, and the child's knowledge, capacity, experience, maturity and intelligence.<sup>43.1</sup>

##### Michigan.

The law recognizes that children act upon childish instincts and impulses. If you find defendant knew or should have known that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.<sup>53.1</sup>

<sup>43.1</sup> *Mundy v. Johnson*, 84 Idaho 438, 373 P2d 755 (1962).

<sup>53.1</sup> *Isom v. Farrugia*, 63 MichApp 351, 234 NW2d 520 (1975)

#### § 425. —Crossing street or highway.

##### Michigan.

The existence of an ordinance allowing a child to cross the street on a green light does not absolve D. P. from looking while crossing the street, and I charge you that that is what an ordinarily prudent seven-year-old person must do when crossing the street.<sup>80.1</sup>

The law recognizes that children act upon childish instincts and impulses. If you find defendant knew or should have known that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.<sup>80.2</sup>

##### Washington.

You are instructed that if R. C. suddenly and without warning ran from behind a telephone pole at the side of the road directly into the path of defen-

dant's pick-up truck, and that the defendant had no opportunity of avoiding him, then it will be your duty to return a verdict in favor of the defendant.<sup>88 1</sup>

<sup>80 1</sup> Pratt v. Berry, 37 MichApp 234, 194 NW2d 465 (1971)

<sup>88 1</sup> Carraway v. Johnson, 63 Wash 2d 212, 386 P2d 420 (1963)

<sup>80 2</sup> Isom v. Farrugia, 63 MichApp 351, 234 NW2d 520 (1975)

## § 427. —Playing, skating, or coasting in street or highway.

### Illinois.

You are instructed that if you find from the greater weight of the evidence that the employees of C. C. knew or by the exercise of ordinary care should have known that M. S. was in the alley and that said employees, by the exercise of ordinary care on their part, could have avoided the accident, then it was their duty to exercise ordinary care, and if you find that they did not exercise ordinary care and thereby caused M. S.'s injuries, then it would be proper for you to return a verdict in favor of M. S.<sup>95 1</sup>

### Ohio.

The defendant when he came from the house of his father-in-law if he saw children there in his automobile or upon some portion of it; that is, if he did see them, was under the circumstances surrounding him at the time bound to use ordinary care to determine from the size and appearance of the children, their age and their discretion, and to exercise care commensurate with the perils of the situation, if any perils then existed.

If you find, however, that the defendant was exercising the degree of care the circumstances required and demanded before he put his automobile in motion, and that after the automobile was in motion the plaintiff jumped upon some portion of it without knowledge on the part of the defendant that the plaintiff was about to do so or had done so, then the defendant would not be liable for any injuries sustained by the plaintiff under such circumstances. If, however, the defendant had reason to believe that children, including the plaintiff, from their conduct and their actions would follow the car or automobile, or come from the side and attempt to climb or jump upon it, or some portion of it, he was bound to use ordinary care in the use of his eyes and senses to avoid injuring them, or any one of them. If he chased these children away and warned them to keep away from his vehicle or car, what did ordinary care require or demand of him at the time he put the automobile in motion? Was he bound to anticipate that the plaintiff would return or that he would not return, or would return and place himself in a position of danger? What would a man of ordinary prudence have done under the circumstances?

I say to you this defendant was bound to know that a child under the age of five years might act upon a childish impulse and if the plaintiff was so close to the car as the defendant got into the car and started it, or put it in motion, and his conduct was such as to lead a prudent man to believe that he was about

to jump upon the car, you have a right to inquire what ordinary care and prudence required of the defendant under such circumstances.<sup>97 1</sup>

**Wisconsin.**

In determining whether or not B. R. was exercising the care that one of her age, capacity, discretion, knowledge and experience would exercise under the same or similar circumstances, due consideration should be given to the child's instincts, for while the child may have the knowledge of an adult respecting dangerous acts, she may not have the prudence, discretion or thoughtfulness to avoid hazards or risks to which she is exposed.

It is important that you keep in mind the difference between the tests to be applied by you in determining the negligence, if any, of B. R. who was riding a bicycle, and the negligence, if any, of L. G. who was operating an automobile.<sup>2 1</sup>

<sup>95.1</sup> *Stowers v. Carp*, 29 IllApp2d 52, 172 NE2d 370 (1961).

<sup>2 1</sup> *Rasmussen v. Garthus*, 12 Wis2d 203, 107 NW2d 264 (1961).

<sup>97 1</sup> *Zehm v. Vale*, 98 OhSt 306, 120 NE 702, 1 ALR 1381 (1918).

**§ 430. Injuries to persons working in street or highway.**

**Maryland.**

On the issue of police officer-plaintiffs contributory negligence, these instructions were not erroneous:

"As I said, this is not strictly a pedestrian case. \* \* \* The Officer, of course, must keep a reasonable lookout for traffic and accommodate himself to the movement of the traffic under the circumstances and he may not just ignore it. Likewise the motorist must be vigilant also as to the traffic in the street in front of him. I suppose, as far as the pedestrian is concerned, in the average case at least, as distinguished from a police officer, his main objective is his own safety. The police officer, of course, is in the performance of his duty. In that connection safety is not always the sole factor. The police officer must exercise reasonable care to preserve his safety and, as I have said before, [the] traveling public must be equally diligent and exercise reasonable care to avoid injury to him or endangering his life and limb. In other words, I think you can boil it down to this: A police officer's legal duty is to keep a reasonable lookout and to exercise care in the circumstances commensurate with the dangers and consistent with his faithful performance of the duties of his employment as a police officer."<sup>6.1</sup>

<sup>6.1</sup> *Clayborne v. Mueller*, 266 Md 30, 291 A2d 443 (1972).

**§ 439. Injuries to persons waiting for, entering, or leaving buses.**

**Wisconsin.**

Evidence has been received as to the [practice in the industry.] This evidence will be weighed and examined by you as it may bear upon whether the conduct

of the defendant measures up to the standard of ordinary care. This evidence of practice is not conclusive as to what meets the required standard for ordinary care or reasonable safety. What is generally done by men engaged in a similar activity has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom cannot overcome the requirement of reasonable safety and ordinary care. A practice which is obviously unreasonable and dangerous cannot serve to excuse a person from responsibility for carelessness. On the other hand, a custom or practice which has enjoyed a good safety record under similar conditions could aid you in determining whether or not defendant was negligent. [Wisconsin Jury Instruction — Civil 1019.]

\* \* \*

The defendant bus company as a common carrier has a duty to discharge a passenger in a place of safety . . . Although the practice is to stop at the curb, there is nothing in the law requiring the bus driver to stop his bus adjacent to the curb, nor is there any evidence that the roadway adjacent to the curb was a dangerous condition. If you find that the bus driver failed to discharge the male plaintiff in a place of safety, you must find the defendant negligent.<sup>35 1</sup>

<sup>35.1</sup> *Victorson v. Milwaukee & Suburban Transport Co.*, 70 Wis2d 336, 234 NW2d 332 (1975).

#### § 441. —Collision of automobile with bicycle, in general.

##### Indiana.

No contributory negligence can be imputed or charged to the plaintiff, R. S., by reason of any act or omission to act on the part of his parents in permitting or allowing him to ride or operate his bicycle on the public streets of the City of Indianapolis at the time and place in question.<sup>46 1</sup>

##### Michigan.

I instruct you, members of the jury, that at the time of this accident the plaintiffs were engaged in a joint venture. If you find that either of the plaintiffs were negligent, that such negligence was a proximate cause of the accident, then both plaintiffs should be barred from recovery, and your verdict would be for the defendant.<sup>48 1</sup>

##### Virginia.

The court instructs the jury that if you believe from the evidence in this case that the infant plaintiff ran or rode from the yard or sidewalk into the path of the defendant's car at a time when in the exercise of ordinary care and prudence the defendant could not avoid colliding with him, then the defendant, if he was otherwise acting prudently, was not guilty of negligence.<sup>56.1</sup>



The following instruction held reversibly erroneous:

The court instructs the jury that the riding of more than one on a bicycle is prohibited unless the bicycle is designed to carry more than one person, in which event a passenger may ride upon the permanent and regular seat if designed for two persons.<sup>56 2</sup>

<sup>46.1</sup> Peckham v. Smith, 130 IndApp 452, 165 NE2d 609 (1960).

<sup>48.1</sup> Massey v. Scripser, 64 MichApp 561, 236 NW2d 142 (1975).

<sup>56.1</sup> Barner v. Whitehead, 204 Va 634, 133 SE2d 283 (1963).

<sup>56.2</sup> Phillips v. Schools, 211 Va 19, 175 SE2d 279 (1970).

**§ 441A. —Bicycles built for two.**

**Michigan.**

I instruct you, members of the jury, that at the time of this accident the plaintiffs were engaged in a joint venture. If you find that either of the plaintiffs were negligent, that such negligence was a proximate cause of the accident, then both plaintiffs should be barred from recovery, and your verdict would be for the defendant.<sup>57 1</sup>

<sup>57.1</sup> Massey v. Scripser, 64 MichApp 561, 236 NW2d 142 (1975).

**§ 445. —Collision of automobile with motorcycle, in general.**

**Missouri.**

The court instructs the jury that if you believe and find from the evidence in this case that on the occasion in question Mr. C. was operating his automobile westwardly over and along Highway 32 in Dent County, Missouri, and that the plaintiff was operating his motorcycle eastwardly over and along said highway, at a time of day which was more than one-half hour after sunset, and in the nighttime, and if you find that the plaintiff did operate his motorcycle in the center of the said highway, and did not operate his motorcycle on the right half of the roadway, or if you find that the plaintiff operated his motorcycle at a rate of speed which was high, excessive and dangerous under all the facts and circumstances then existing according to the evidence, or if you find that the plaintiff was operating his motorcycle at a time of day which was more than one-half hour after sunset, and in the nighttime, without having a burning headlight directed to the front thereof and clearly visible at a distance of 500 feet under ordinary atmospheric conditions, and if you find that in so operating his motorcycle in any or all of the particulars aforesaid the plaintiff was negligent and that such negligence of plaintiff, if any, directly contributed to cause the collision in question and plaintiff's injuries, then the plaintiff cannot recover against the defendant, and your verdict must be in favor of the defendant; and this is true, without regard to whether or not you find that the defendant was negligent under other instructions of the court.<sup>72.1</sup>

<sup>72.1</sup> Richardson v. Cope (Mo), 370 SW2d 318 (1963).

### § 450. Automobiles meeting, in general.

#### Kansas.

You are instructed that the driver of a motor vehicle on the proper side of a highway has the right to presume that an automobile approaching from the opposite direction on the left or wrong side of the highway will get over to his own proper side in time to avoid a collision, and the person on his own right side is under no duty to proceed under any other assumption until he has notice to the contrary, but once the person on the proper side of the road has or reasonably should have knowledge that the other driver is not going to or cannot return to his own side of the road, the driver on his own right side of the road must take all reasonable steps possible to avoid a collision.<sup>98 1</sup>

#### Maryland.

I instruct you that if a person was driving in the twilight, and was aware or should have been aware that there was a well-paved shoulder to his right, and that that person, while travelling in his proper lane, met an approaching vehicle proceeding on the wrong side of a two-lane road, that swerving into the opposite lane instead of onto the well-paved shoulder in order to avoid a collision cannot be said to be negligence as a matter of law.<sup>3 1</sup>

#### Pennsylvania.

Whenever there is evidence presented by both the plaintiff and the defendant that each was in his or her own lane of traffic, then the plaintiff does not establish a *prima facie* case of negligence by showing either that the defendant's vehicle skidded on ice or by presenting testimony to the effect that the defendant had crossed the center of the roadway. Thus the trial court properly refused the following charge requested by the plaintiff:

"If you find that Miss Michael violated her duty to drive on the right-hand side of the street as far as possible to the right-hand edge or curb, and that this violation was due to her skidding on ice, you are instructed that being on the wrong side of the street is negligence and that Miss Michael bears the burden of proof to show that she was not to blame."

Whenever there is conflicting testimony, it is exclusively the province of the jury to decide which of the parties' conflicting testimony is entitled to more credibility. Therefore, the plaintiff is entitled to an instruction that if it believed the plaintiff's testimony that the defendant was on the wrong side of the road, then the burden was on the defendant to prove that he/she was not negligent by being there. Contrawise, the defendant was entitled to an instruction that if it believed the defendant's testimony, then the burden was on the plaintiff to prove that the plaintiff was not negligent by being on the wrong side of the road.<sup>18.1</sup>

<sup>31</sup> Fouce v Masters, 420 A2d 1279 (MdApp 1980).

<sup>18,1</sup> Kuhn v Michael, 423 A2d 735 (PaSuper 1980)

<sup>88,1</sup> Soden v Gemberling, 188 Kan 716, 366 P2d 235 (1961)

### § 453. —Marked traffic lanes.

#### Missouri.

Your verdict must be for defendant if you believe that plaintiff's injuries were not directly caused by defendant's failure to operate his automobile on the right half of the roadway.<sup>35 1</sup>

<sup>33,1</sup> Morris v Klein (Mo), 400 SW2d 461 (1966)

### § 456. —While or after overtaking or passing another vehicle.

#### Washington.

You are instructed that the operator of a vehicle may overtake and pass upon the right of another vehicle upon a street or highway with unobstructed pavement not occupied by parked vehicles or sufficient width for two or more lanes of moving vehicles in each direction.<sup>49 1</sup>

<sup>49,1</sup> Vangemert v. McCalmon, 68 Wash2d 618, 414 P2d 617 (1966)

### § 457. —Automobiles crossing — Intersections — Right of way.

#### Alabama.

\* \* \* If at an intersection one street is what is commonly called a through-street, that is, one traveling the same has the right-of-way over one approaching the intersection on the other street, it is the duty of the one approaching the through-street to exercise a degree of care commensurate with the superior right of the other, to observe the vehicle of the other, his speed, position, and operation, and to wait until it has passed before attempting to cross the intersection. Observation should be made at the first opportunity and at a point where observation will be reasonably efficient for and conclusive to protection and from the failure to do so negligence may be inferred.<sup>51 1</sup>

#### Arkansas.

When two vehicles enter an intersection from different directions at the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. However, a vehicle which has entered an intersection first, while in the exercise of reasonable care for his own safety and the safety of others, has the right-of-way over another vehicle approaching the intersection but not having entered it.<sup>54 1</sup>

**Indiana.**

I instruct you that the law of the State of Indiana gives the right of way at an intersection of county roads, to that one of two vehicles, first entering the intersection, and if you find that the car in which plaintiff was riding entered the intersection before the defendant's insured entered it, then, the insured would be guilty of negligence as a matter of statutory law if entering the intersection until the car in which plaintiff was riding had cleared it, and would be guilty of negligence in driving at such speed, if he did, that he could not stop or slow down and permit the car in which the plaintiff was riding to proceed safely on through the intersection.

If you find the car in which the plaintiff was riding and the truck entered the intersection at the same time, and that the truck was coming from the north and the car in which plaintiff was riding was coming from the west, then the law required the truck to yield the right of way and failure, if any, to do so would be negligence on the part of the driver of the truck as a matter of law for purposes of this case and as against defendant herein.<sup>69 1</sup>

**Iowa.**

Even though a pedestrian in a crosswalk has the right of way over an approaching motorist when there is danger of collision, the pedestrian still must exercise ordinary care and caution to avoid a collision with a motor vehicle when there is danger of a collision.

A pedestrian's failure to exercise such ordinary care and caution constitutes negligence.<sup>70 1</sup>

**Minnesota.**

The driver of a vehicle upon a through highway who is approaching an intersection knowing that it is protected by yield the right of way signs, may assume until he sees or should see otherwise that the driver approaching the intersection on the intersecting highway will respect the right of way and obey the law.<sup>74 1</sup>

**Mississippi.**

The court instructs the jury for the plaintiff that if you believe from a preponderance of the evidence that the traffic control light at the intersection of Northside Drive and Highway 49 was, just prior to and at the moment of the collision, red in the North and South direction, and green in the East and West direction, and if you further believe from a preponderance of the evidence that the plaintiff, L., had entered the intersection of Northside Drive and Highway 49 and was, at the moment of the collision, headed in a westerly direction and if you further believe from a preponderance of the evidence that the defendant, C. I., was traveling in a southerly direction and failed to bring his automobile to a stop in obedience to the traffic control device at said intersection, and that the failure of said C. I. to obey the traffic control device proximately contributed to said collision, then your verdict must be for the plaintiff.<sup>74 2</sup>

**Missouri.**

The court instructs the jury that merely because plaintiff entered the intersection first, if so, would not give the plaintiff the right of way if you find from the evidence that when plaintiff entered said intersection the defendant was approaching so closely on Second Street as to constitute an immediate hazard, and if you find from the evidence that plaintiff entered said intersection when defendant was approaching so closely on Second Street as to constitute an immediate hazard, and if you further find that in so doing plaintiff failed to exercise the highest degree of care and was thereby negligent and that such negligence directly contributed to cause the collision \* \* \*.<sup>77 1</sup>

The court instructs the jury that under the ordinance law admitted in evidence it was the duty of the driver of an automobile on the left to yield the right of way to an automobile on the right where said vehicles entered the intersection at the same time.

You are instructed that if you find and believe from the evidence that Mr. K.'s automobile entered the intersection prior to the time that the automobile operated by the defendant, Mrs. B., entered the intersection, or if you find and believe that the automobiles in question entered said intersection at the same time, and if you further find that the defendant, Mrs. B., herein failed to yield the right of way, then you are instructed that the defendant, Mrs. B., was negligent, and if you further find that such negligence, if any, on the part of the defendant, Mrs. B., directly caused the collision in question, and the injuries, if any, sustained by the plaintiff, Mr. K., and property damage, if any, sustained by the plaintiff, Mr. K.'s automobile, and if you further find that the plaintiff, Mr. K., was at all times herein mentioned in the exercise of the highest degree of care for his own safety, then you are instructed that your verdict must be for Mr. K. on his petition and against the defendant, Mrs. B.<sup>77 2</sup>

The court instructs the jury that under the law of Missouri the driver of a vehicle within an intersection intending to turn to the left is required to yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

Therefore, the court instructs the jury that if you find and believe from the evidence that on the occasion mentioned in the evidence plaintiff, E. S., was driving her automobile eastwardly on Highway 42 and intending to turn left into the country road mentioned in the evidence, and that at said time and place defendant, D. P. N., was operating his automobile in a westwardly direction on Highway 42 and approaching the intersection of said country road and Highway 42, and if you further find and believe that plaintiff turned to the left and drove her car across the center line of Highway 42 when the automobile of defendant was so close to the aforesaid intersection as to constitute an immediate hazard, if you so find, and that by so doing plaintiff failed to yield the right of way to defendant's automobile and in so doing failed to exercise the highest degree of care and was negligent, and that such negligence, if any, contributed to cause the collision in question, then the plaintiff, E. S., is not entitled to recover against the defendant, and your verdict will be in favor of defendant, D. P. N.<sup>77 3</sup>

The phrase "right of way," as used in these instructions, means the right of one vehicle to proceed ahead of the other.

When the driver of a vehicle intends to make a left turn into a driveway and another vehicle is overtaking and passing and is so close that the turn would create a traffic hazard, the overtaking vehicle has the right to proceed past the turning vehicle.<sup>77 4</sup>

The Court instructs the jury that if you find and believe from the evidence that Mr. N. arrived at the intersection mentioned in evidence either before or at approximately the same time that the defendant did so, and that the defendant failed to yield the right of way to Mr. N. and failed to permit him to proceed across the intersection ahead of the defendant, and that in so failing the defendant failed to exercise the highest degree of care and was negligent, and that Mr. N. was injured as a direct result thereof, \* \* \*.<sup>77 5</sup>

#### Montana.

It was not necessary for the plaintiff to have looked as far as his eyes could reach to his right before proceeding across the intersection. His duty in that respect was performed if he looked sufficiently far to his right to discover that there was no traffic approaching from that direction within a distance that would not be traversed by a vehicle driven at a speed permitted by law. He was not required to look always to his right while crossing or turning in the intersection as he had to avoid endangering traffic ahead of him or approaching from his left.<sup>77 6</sup>

#### New Mexico.

The driver of a vehicle approaching an intersection shall yield the right of way to vehicle which has entered the intersection from a different street, but this rule applies to a vehicle approaching from the left only if such vehicle shall have arrived at the intersection so far in advance of the vehicle on its right that a reasonably prudent person would be justified in believing that he could clear the intersection of the paths of the two vehicles before the other car arrived there.<sup>80 1</sup>

#### North Carolina.

If the plaintiff had the green light when she entered the intersection, she had the right to proceed through unless the defendant, in obedience to a green light, had already entered and was in the intersection, in which event it would be her duty to yield the right of way.<sup>82.1</sup>

#### North Dakota.

If two vehicles enter an intersection from different streets at approximately the same time, the driver of the vehicle on the left must yield the right of way to the vehicle on the right, except in certain situations not pertinent in this case.<sup>82.2</sup>

**Oklahoma.**

Under the laws of this state, at intersecting roads or streets, vehicles approaching from the right shall have the right of way over those approaching from the left, and this means that where two vehicles reach the intersection at approximately the same time the one approaching from the left shall pause and permit the one approaching from the right to pass the intersection first, but if the vehicle approaching from the left enters the intersection an appreciable length of time ahead of one approaching from the right, it would have the right of way since the vehicle entering the intersection first has the right of way over the other, whether approaching from the right or left. This does not mean that a vehicle not having the right of way, must at its peril avoid collision with the vehicle having the right of way, irrespective of care or negligence by either party, nor does this release the driver of the favored vehicle from the duty of exercising due care. Both drivers must exercise every reasonable precaution, commensurate with apparent dangers incident to crossing intersections burdened with traffic to avoid injury to the persons or property on such roads or streets regardless of which vehicle has the right of way.<sup>85 1</sup>

**Pennsylvania.**

A vehicle on a through highway has the right of way over one on an intersecting highway. "There is no testimony in this case concerning which was the thru and which the intersection or intersecting highway or whether they were of equal importance. Therefore the question of the right of way is entirely for you to determine from all the evidence which you have heard."<sup>89 1</sup>

**Washington.**

(1) The laws of the State of Washington provide that drivers, when approaching highway intersections, shall look out for and give the right of way to vehicles on their right simultaneously approaching a given point within the intersection, whether such vehicles first enter and reach the intersection or not.

This right of way, however, is not absolute but relative, and the duty to avoid accidents or collisions at highway intersections rests upon both drivers. The primary duty, however, rests upon the driver upon the left, which duty he must perform with reasonable regard to the maintenance of a fair margin of safety at all times.

If two cars collide within an intersection, then they must be considered to have been simultaneously approaching a given point within the intersection, within the meaning of the law. However, if the driver on the left meets the burden of producing evidence showing that the favored driver on the right so wrongfully, negligently or unlawfully operated his car as to deceive the driver on the left, as a reasonably prudent man, and warrant him in going forward on the assumption that he has the right to proceed, then the right of way rule would not apply in favor of the driver on the right.<sup>88 1</sup>

(2) You are instructed that it was the duty of the plaintiff before entering upon the arterial highway to see and observe all traffic upon said arterial

highway and to determine the speed at which cars on the arterial highway were traveling, if by the exercise of ordinary care, he could have reasonably done so.

You are instructed if you find from the evidence that the plaintiff driver knew or by the exercise of ordinary care should have known the plaintiff's car was traveling at a fast rate of speed, if it was so traveling, then in such event his duty to look out for and give right of way to the automobile traveling on the arterial was intensified rather than diminished.<sup>98 2</sup>

(3) The laws of the State of Washington provide that drivers, when approaching highway intersections, shall look out for and give the right of way to vehicles on their right simultaneously approaching a given point within the intersection, whether such vehicles first enter and reach the intersection or not.

This right of way, however, is not absolute but relative, and the duty to avoid accidents or collisions at highway intersections rests upon both drivers. The primary duty, however, rests upon the driver upon the left, which duty he must perform with reasonable regard to the maintenance of a fair margin of safety at all times.

If two cars collide within an intersection, then they must be considered to have been simultaneously approaching a given point within the intersection, within the meaning of the law. However, if the driver on the left meets the burden of producing evidence showing that the favored driver on the right so wrongfully, negligently or unlawfully operated his or her car as to deceive the driver on the left, as a reasonably prudent man or woman, and warrant him or in going forward on the assumption that he or she had the right to proceed, then the right of way rule would not apply in favor of the driver on the right.<sup>98 3</sup>

<sup>51.1</sup> Donald v. Matheny, 276 Ala 52, 158 S2d 909 (1963)

<sup>54.1</sup> Jarrett v. Matheny, 236 Ark 892, 370 SW2d 440 (1963).

<sup>68.1</sup> Automobile Underwriters, Inc. v. Smith, 131 IndApp 454, 166 NE2d 341 (1960)

<sup>70.1</sup> Van Treese v. Holloway (Ia), 234 NW2d 876 (1975).

<sup>74.1</sup> Koenigs v. Werner, 269 Minn 530, 134 NW2d 301 (1964).

<sup>74.2</sup> Jackson Yellow Cab Co., Inc. v. Alexander, 246 Miss 268, 148 S2d 674 (1963)

<sup>77.1</sup> Scott v. Gray (Mo), 337 SW2d 38 (1960)

<sup>77.2</sup> Klee v. Bryan (MoApp), 346 SW2d 695 (1961).

<sup>77.3</sup> Spearman v. Nies (Mo), 358 SW2d 769 (1962).

The court remarked that although paragraph one is surplusage, the instruction was not misleading.

<sup>77.4</sup> George v. Wheeler (Mo), 404 SW2d 426 (1966)

<sup>77.5</sup> Norris v. Winkler (Mo), 402 SW2d 24 (1966)

<sup>77.6</sup> Jessen v. O'Daniel, 136 Mont 513, 349 P2d 107 (1960)

<sup>80.1</sup> Savage v. Linthicum, 76 NM 531, 417 P2d 29 (1966)

<sup>82.1</sup> Jenkins v. Gaines, 272 NC 81, 157 SE2d 669 (1967).

<sup>82.2</sup> Munro v. Privratsky (ND), 209 NW2d 745 (1973).

<sup>85.1</sup> Fowler v. Sylvan (Okla), 360 P2d 946 (1961).

<sup>89.1</sup> Amat v. Williams, 211 PaSuper 398, 236 A2d 551 (1967)

<sup>98.1</sup> Key v. Reising, 55 Wash2d 512, 348 P2d 410 (1960).

<sup>98.2</sup> Bell v. Bennett, 56 Wash2d 780, 355 P2d 331 (1960)

<sup>98.3</sup> Bockstruck v. Jones, 60 Wash2d 679, 374 P2d 996 (1962).



**§ 459. —Traffic signs and signals in street or highway.****California.**

The driver of any vehicle approaching a stop sign at the entrance to, or within an intersection shall stop as required by Section 22450 and shall then yield the right of way to other vehicles which have approached or are approaching so closely from another roadway as to constitute an immediate hazard and shall continue to yield the right of way to such approaching vehicles until such time as he can proceed with reasonable safety.<sup>37 1</sup>

**North Carolina.**

The law requires a driver to exercise due care in entering an intersection, even though she is entering on the green light. She must exercise the care that a reasonably prudent person would exercise, under the circumstances, taking into consideration the possibility that someone might come in the intersection in violation of the rule, coming in the intersection on the red light.<sup>39 1</sup>

**North Dakota.**

I charge you that even though you find that the defendant failed to stop at the stop sign, yet, if such failure to stop was not the proximate cause of the collision, that is, if the collision did not occur by reason of the failure to stop and that such failure to stop was not the proximate cause of the injuries which plaintiff's automobile sustained, then such failure to stop did not proximately cause the damage to plaintiff's car.<sup>39 2</sup>

**Ohio.**

I hereby charge you as a matter of law that if the vehicle of defendant P. W. Association entered the intersection of East Seventy-ninth Street and Carnegie Avenue when the automatic traffic light governing its movement showed green, or yellow following the green, and before the vehicle operated by plaintiff R.J.P. had entered the intersection, that it was the duty of plaintiff R.J.P. to yield the right of way to the P. W. Association vehicle to permit it to proceed through the intersection and also to use ordinary care to avoid the collision, even though the traffic light then showed green for plaintiff R.J.P. I further charge you as a matter of law that if plaintiff R.J.P. did fail to yield the right of way, if any, to the defendant's jeep, or did fail to exercise ordinary care to avoid the collision, under the circumstances stated in this charge, and that such failure directly caused or contributed to cause the collision, then I charge you that plaintiff R.J.P. cannot recover from the defendant and your verdict must be for defendant P. W. Association.<sup>41 1</sup>

<sup>37.1</sup> Newmann v. Bishop, 130 CalRptr 786, 59 CalApp3d 451 (1976).

<sup>39.1</sup> Wrenn v. Waters, 9 NCApp 39, 175 SE2d 368 (1970).

<sup>39 2</sup> Reuter v. Olson, 79 ND 834, 59 NW2d 830 (1953)

<sup>41.1</sup> Prather v. Phillis Wheatley Assn., 8 OhApp2d 91, 193 NE2d 290 (1963).

**§ 460. —Horn and signals of driver.****Oregon.**

The next charge is defendants failed to yield the right of way to plaintiff. The defendants by their answer have a similar charge against the plaintiff, in that she failed to yield the right of way to the vehicle of the defendants. Thereby, both parties charge the opposing party with a violation of the statute or statutory negligence as I have defined that, and by these charges of negligence, each charges the other with violation of a particular statute. The statute to which both parties have reference reads as follows: "The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard. Having so yielded and having given a signal when and as required by law, the driver may make such left turn, and other vehicles approaching the intersection from the opposite direction shall yield to him." Violation of this statute on the part of either party in the sense that is charged, would constitute statutory negligence or negligence in and of itself.<sup>43.1</sup>

<sup>43.1</sup> *Dare v. Garrett Freightlines, Inc.*, 234 Or 61, 380 P2d 119 (1963)

**§ 461. Automobile following or overtaking and passing another automobile.****Michigan.**

Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured, clear distance ahead.<sup>49.1</sup>

**Missouri.**

(5) The court instructs the jury that if you find from the evidence that Mr. K. brought his automobile to a stop at Compton in obedience to a red electric stop light signal which was then displayed, and if you further find that the defendant, St. Louis Public Service Company, suffered and permitted its streetcar to strike and collide with the rear end of Mr. K.'s automobile after it had been stopped for ten seconds or more, and that in so doing the defendant failed to exercise ordinary care and was negligent, and that Mr. K. was injured as a direct result thereof, then and in that event Mr. K. is entitled to recover, and your verdict should be in his favor.<sup>53.1</sup>

**Washington.**

(4) You are instructed that if you find by a fair preponderance of the evidence that a reasonably prudent driver under the same or similar circumstances to those in which P. found himself would not have so stopped or would not have remained stopped as long a time as was done by P. or would have kept a watch to the rear then any such omission would be negligence and if such negligence proximately caused the collision plaintiff cannot recover herein.

You are instructed that if you find by a fair preponderance of the evidence that the plaintiff, D.P., either knew or in the exercise of due care should have known that either before or as he was preparing to make his left hand turn that such action or attempted action on his part created a dangerous condition for following traffic, and that a reasonably prudent driver in such a situation would not have stopped and attempted to make a left hand turn and that such actions on the part of the plaintiff was the proximate cause of the accident in question, then in such event your verdict must be in favor of defendants.<sup>63 1</sup>

<sup>49 1</sup> *Hirdes v. Selvig*, 369 Mich 173, 119 (MoApp), 360 SW2d 261 (1962)  
NW2d 537 (1963).  
<sup>63 1</sup> *Phillips v. Richmond*, 59 Wash2d 571,  
<sup>63 1</sup> *Kagan v. St. Louis Public Service Co* 369 P2d 299 (1962).

**§ 462. —Speed and control.****Iowa.**

The jury must take into consideration all circumstances shown by the evidence to have existed at the time of the accident including visibility and lack of a marking showing the center of the traveled portion of the road.<sup>67 1</sup>

**Missouri.**

(1) The court instructs the jury that if you find and believe from the evidence that the plaintiff brought his said automobile to a sudden and abrupt stop and that the defendant, P., thereafter could not, by the exercise of the highest degree of care, have stopped his said motor truck, turned the same aside, and thus and thereby have avoided striking the automobile which the plaintiff was then and there operating, then your verdict must be for the defendants, providing you further find that the defendant P. was not negligent in any way in the operation of defendants' said motor truck.<sup>68 1</sup>

(2) The court instructs the jury that it is the duty of the driver of an automobile following another automobile to keep a lookout to observe the automobile ahead and its movements and to keep his automobile under control so that he would not run into the automobile ahead should it slow down or stop, and to keep his automobile a sufficient distance behind the automobile in front of him so as to avoid the danger of collision in case of the sudden stopping of the automobile ahead.

You are further instructed that if you find from the evidence that on the occasion mentioned in evidence, defendant D.F., then acting within the course and scope of his employment as agent, servant and employee of the defendant,

A. Incorporated, if so, did not exercise the highest degree of care in keeping a lookout to observe the automobile ahead and its movements, and in keeping his station wagon under control so that he would not run into the automobile ahead if it slowed down or stopped, and if you further find that defendant D.F. did not exercise the highest degree of care to keep his automobile a sufficient distance behind the automobile operated by defendant H. so as to enable him to avoid colliding with the H. automobile as it slowed and stopped, and if you further find that such conduct on the part of defendant D.F., if any, was negligent and that such negligence, if any, directly caused or directly contributed to cause plaintiff's injuries, if any, then your verdict should be in favor of plaintiff and against defendant D.F. and the defendant, A. Incorporated.<sup>68.2</sup>

Plaintiff requested an instruction, subsequently given, which essentially directed a verdict against the defendant, which stated, in essence, that defendant was driving too closely behind plaintiff, that this was negligence, and that such negligence caused the action complained of. The appellate court reversed, saying that there was no evidence whatsoever drawing a connection between the actions of the defendant and the collision and that the requested instruction complained of was clearly prejudicial and erroneous.<sup>68.3</sup>

#### Nebraska.

Where there is a statutory speed limit the court should submit the issue of speed in excess of the statutory limit where the jury is required to make a special finding and the failure to do so is prejudicial error.<sup>69.1</sup>

#### Washington.

Where two cars are traveling in the same direction, the primary duty of avoiding a collision rests with the following driver. In the absence of an emergency or unusual conditions he is negligent if he runs into the car ahead. The following driver is not necessarily excused even in the event of an emergency, for it is his duty to keep such distance from the car ahead and maintain such observation of that car that an emergency stop may be safely made.<sup>70.1</sup>

<sup>67.1</sup> *Spry v. Lamont*, 257 Ia 321, 132 NW2d 446 (1965).

<sup>68.1</sup> *Withers v. Pettit* (Mo), 337 SW2d 66 (1960).

<sup>68.2</sup> *Gooch v. Avsco, Inc.* (Mo), 337 SW2d 245 (1960).

<sup>68.3</sup> *Pyles v. Roth* (Mo), 421 SW2d 261 (1967).

<sup>69.1</sup> *Zavoral v. Pacific Intermountain Express*, 178 Neb 161, 132 NW2d 329 (1965).

<sup>70.1</sup> *Van Ry v. Montgomery*, 58 Wash2d 46, 360 P2d 573 (1961).

### § 464. Automobiles stopping, starting, turning, and backing.

#### Florida.

If you find from the evidence in this case that the sudden backing of an automobile in front of defendant's bus was the sole cause of the collision between said bus and the automobile in which plaintiff was riding, then I charge you that you must return a verdict for the defendant.<sup>85.1</sup>

**Missouri.**

The court instructs the jury that if you find and believe from the evidence that on the occasion mentioned in evidence, F.S. was operating an automobile in an easterly direction on Bartmer Avenue approaching its intersection with Delaware, and if you further find that as he was doing so, plaintiff was operating her automobile in a southerly direction on Delaware Street and drove her said automobile into the intersection of Delaware and Bartmer and was turning her automobile to her left and in an easterly direction, and if you further find that in so doing plaintiff passed out of the path of F.S.'s eastbound automobile and that her automobile was then within approximately one foot of the south curb of Bartmer headed in an easterly direction and was stopped or was moving at a speed of two or three miles per hour and was not in a position of danger of being struck by F.S.'s automobile, and if you further find that as F.S. approached the rear of plaintiff's automobile and was commencing to pass her said automobile, plaintiff drove her said automobile from a position of safety and toward and into the path of F.S.'s automobile, and if you further find that as plaintiff did so, F.S.'s automobile was then so close to plaintiff's automobile that he could not thereafter have avoided a collision mentioned in evidence by stopping his automobile or slackening the speed thereof, then you are instructed that under the law, the plaintiff is not entitled to recover and your verdict will be in favor of defendant F.S.<sup>96 1</sup>

**New Mexico.**

I further instruct you that it was the duty of the driver of the truck in this case before turning such vehicle from Solano Drive to the left, to first see that such movement could be made in reasonable safety and, if it could not be made in safety, then it was his duty to wait until he could make such turn in safety.<sup>97.1</sup>

**Washington.**

You are instructed that it is the primary duty of the driver approaching from the rear to avoid a collision, and, in absence of an emergency or unusual conditions, the driver to the rear is negligent if he runs into the car ahead of him. The driver to the rear is not necessarily excused even in the event of an emergency, for it is his duty to keep such lookout and observation of the vehicle ahead, so that he can stop his vehicle without collision. However, the following driver is not negligent simply because he collides with a vehicle in front of him.<sup>12 1</sup>

<sup>85.1</sup> Florida Motor Lines v. Casad, 98 Fla 720, 124 S 180 (1929).

<sup>96.1</sup> Montgomery v. Sobel (Mo), 334 SW2d 112 (1960).

<sup>97.1</sup> Mills v. Southwest Builders, Inc., 70 NM 407, 374 P2d 289 (1962).

The instruction has been changed to conform to the court's opinion.

<sup>12.1</sup> Vangemert v. McCalmon, 68 Wash2d 618, 414 P2d 617 (1966).

**§ 465. —Speed.****Iowa.**

It is not error to require plaintiff to prove that defendant "materially reduced the speed of his motor vehicle when he knew, or in the exercise of ordinary care, should have known that the motor vehicle in which plaintiff was riding was behind him, and so close that the reduction of speed would likely result in a collision."<sup>18 1</sup>

**Rhode Island.**

Every person driving upon the highway is charged with driving a motor vehicle within that posted speed limit, but also at a reasonable rate of speed considering all the circumstances then and there present. Failure to reduce speed under circumstances mandated by statute as requiring reduction of speed can be taken as evidence of negligence.<sup>18 2</sup>

**Wisconsin.**

"As to subdivision (b), which inquires as to speed, at the time and place in question, the allowable maximum speed limit prescribed by law on South Delaware Avenue was 25 miles per hour, there being no evidence of any other posted speed limit. It was also the law of this state at that time that no person shall operate a vehicle at a speed greater than is reasonable and prudent under conditions, having regard for actual and potential hazards then existing; and the speed of the vehicle is to be so controlled as may be necessary to avoid colliding with any person on the highway, in compliance with legal requirements." Since a fixed speed limit was involved standard Wisconsin Jury Instruction No. 1290 appropriately adapted to the circumstances was proper. There is no prejudicial error in giving a standard instruction as to speed.<sup>19.1</sup>

<sup>18.1</sup> *Stam v Cannon* (Ia), 176 NW2d 794 (1970).

<sup>18.2</sup> *Oddo v. Cardi*, 100 RI 578, 218 A2d 373 (1966).

<sup>19.1</sup> *Nieman v American Family Mut. Ins. Co.*, 38 Wis2d 62, 155 NW2d 809 (1968).

**§ 466. —Lookout.****Indiana.**

The driver of an automobile upon a public highway is required to see what he could have seen if he had exercised due care under the circumstances, and he is not excused for the failure to discover danger and avoid the same, if, by the use of ordinary care, he could have discovered and avoided it.

Therefore, if you find from a greater weight of the evidence, that the defendant, herein, H. D. M. could have, by the use of ordinary care, seen plaintiff's decedent prior to the collision, in time to have operated his automobile differently or stopped or slowed the same, and if you further find from a greater weight of the evidence, that by the use of ordinary care, the defendant could

have avoided the collision with plaintiff's decedent, then you are instructed that such failure to exercise reasonable or ordinary care on the part of the defendant constitutes negligence.<sup>19 2</sup>

<sup>19.2</sup> *Shelby Nat. Bank v. Miller*, 147 IndApp 203, 21 IndDec 675, 259 NE2d 450 (1970)

**§ 467. —Signals of operator.**

**California.**

No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement.<sup>24 1</sup>

**West Virginia.**

The court instructs the jury that under the traffic regulations and laws of the State of West Virginia, it is the duty of the driver of a vehicle upon all roadways of sufficient width to drive said vehicle upon the right half of the roadway, and the law further provides that no person shall turn a vehicle from its direct course or turn said vehicle from the right half of the roadway unless and until such movement can be made with reasonable safety; that the driver of the vehicle intending to turn left must first give a hand or mechanical signal of his intention to make said left-hand turn continuously during not less than the last one hundred feet travelled by the vehicle before making the left-hand turn, and that the failure to observe either of these rules constitutes prima facie negligence.

You are therefore further instructed that if you believe from the evidence in this case that E. L. P. made a left-hand turn when such movement could not be made with reasonable safety, or if you believe from the evidence in this case that E. L. P. made a left-hand turn on the highway without first giving a proper signal of his intention so to turn continuously during not less than the last one hundred feet travelled by his said vehicle before making said left-hand turn, then, in either event, you are instructed that such action constitutes negligence, and if you further believe that such negligence was a proximate cause of the wreck in this case then you should find for the defendant.<sup>37 1</sup>

<sup>24.1</sup> *Newmann v. Bishop*, 130 Cal Repr 786, 59 CalApp3d 451 (1976).

<sup>37.1</sup> *Piper v. Miller*, 154 WV 178, 173 SE2d 662 (1970).

**§ 469. Automobiles standing, parked, or unattended.**

**Georgia.**

Following instruction erroneous as having reference only to the statute as establishing duties with regard to stopping outside a business or residence district when the statute applies throughout the State:

I further charge you gentlemen, that since the alleged collision occurred within the corporate limits of the City of Alma, if you find from a preponderance of the evidence that the alleged collision occurred within a residence district, there is no statute law of the State of Georgia which would have prevented the defendants, or either of them, from parking a vehicle upon the paved or main traveled part of the highway. Now reference herein to residence district is as defined in Code Section 68-1504, Paragraph 5, Subparagraph b, which provides as follows: "Residence District. The territory contiguous to and including a highway not comprising a business district when the property on such highway for a distance of 300 feet or more is in the main improved with residences or residences and buildings in use for business; Provided, however, that when such territory is located outside the incorporated limits of a city or town, it is designated and marked as such by the Director of Public Safety." <sup>42 1</sup>

#### **Iowa.**

You are instructed that under the statute of Iowa it is unlawful for any person to stop, park or leave standing any vehicle upon any highway outside of a business or residential district, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least twenty feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of two hundred feet in each direction upon such highway; and that if plaintiff violated this section, he would be guilty of negligence.

You are further instructed that if you find that the vehicle of the plaintiff was disabled while on the paved or improved or main traveled portion of the highway in such a manner and to such an extent that it was impossible to avoid stopping and temporarily leaving such disabled vehicle in such position, then said statute shall not apply and plaintiff would not be guilty of negligence. <sup>44 1</sup>

#### **Pennsylvania.**

It is prejudicial error for the trial court to grant a charge that does not take into account all the presented testimony. For example, the following charge was found to be prejudicial error because the charge related only to the question of parking on the highway, and did not deal with the situation for which there was testimony, of stopping on the roadway in order to let someone by or to momentarily allow traffic to pass:

"Three, the Pennsylvania Motor Vehicle Code prohibits any person from stopping a motor vehicle on a roadway without leaving a clear and unobstructed width remaining for the free passage of vehicles coming in the opposite direction; affirmed."

They should have included additional commentary by the court drawing the jury's attention to the fact that stopping along the side of the roadway would be proper and not negligent if done for a proper purpose and under proper circumstances. <sup>53 1</sup>



<sup>42.1</sup> Taylor v Floyd Pike Elec. Contractors, Inc., 121 GaApp 440, 174 SE2d 278 (1970)

<sup>53.1</sup> Kuhn v Michael, 423 735 (PaSuper 1980).

<sup>44.1</sup> Pinckney v Watkinson, 254 Ia 144, 116 NW2d 258 (1962)

### § 470. —Lights.

#### Missouri.

The court instructs the jury that the law of the State of Missouri requires that every person who is in custody of a motor vehicle on any street from a half hour after sunset to a half hour before sunrise shall have displayed upon the rear of said vehicle a lighted red lamp.

In this regard, the court instructs the jury that if you find and believe from the evidence that on the occasion mentioned in evidence, at a time between a half hour after sunset and a half hour before sunrise, plaintiff, T. C. W., was in custody of and was operating his Berkeley sports car mentioned in evidence eastwardly upon Natural Bridge Road, and that said sports car became stopped upon the eastbound traveled portion of said Natural Bridge Road, and if you further find that plaintiff permitted said sports car to be and remained stopped upon the eastbound traveled portion of Natural Bridge Road without having a lighted red lamp displayed on the rear of said sports car, and that in so permitting said sports car to be and remain stopped without having a lighted red lamp displayed on the rear thereof, if you so find, the plaintiff, T. C. W., failed to exercise the highest degree of care and was negligent, and if you further find that such negligence, if any, on the part of the plaintiff, directly contributed to cause defendant's automobile to collide with the rear of plaintiff's said sports car, then you are instructed that your verdict should be against the plaintiff and in favor of the defendant, and this is true regardless of whether or not defendant was also negligent.<sup>63.1</sup>

<sup>63.1</sup> Wiber v. Mana (Mo), 356 SW2d 88 (1962).

### § 471. —Place.

#### Ohio.

\*\*\* If you find by a preponderance of the evidence that defendant on the date in question and at the time of this accident was parked upon one of the streets in the village of Canal Fulton, Ohio, in violation to the ordinance which the court just read to you, then in that event the defendant is negligent as a matter of law \*\*\*.

However, the defendant claims that although it violated the ordinance by parking in a prohibited zone that the action cannot be negligence because the defendant was faced with an emergency.

Well, what do we know about an emergency? Webster says this: "An emergency is a — a sudden, generally unexpected occurrence or set of circumstances, demanding immediate action."

In view of the claim of the defendant, members of the jury, you will be called upon to determine this question of whether or not there was an emergency that

existed at the time of the accident involved, in this case; and in order to determine this question you may take into consideration the breakdown of the truck of this defendant, where it occurred, the moving of the truck, the place where the truck was moved, the time involved, what was done by the servants of the defendant and all other facts and circumstances of the case. And after considering the evidence on this question and you come to the conclusion then that an emergency was created, then go further and determine whether or not at the time of the accident the emergency had ceased or was permitted to continue.

If you find by a preponderance of the evidence that at the time of the accident the emergency had ceased, then as a matter of law the defendant was negligent in parking its truck in violation of the ordinance.

If you find by a preponderance of the evidence that at the time of the accident that an emergency had existed, then the defendant had a legal excuse for parking in violation of the ordinance and the defendant would not be negligent in that particular respect.

If a person, without fault of his own, is placed in a position of a sudden emergency, the same degree of judgment and care is not required of him as is required of one who is acting under normal conditions. The test in an emergency situation is not what a reasonably careful person would do or not do under ordinary circumstances, but what a reasonably careful person might be expected to do or not do under the same or similar emergency circumstances.

Now as the court indicated the defendant claims that it had a legal excuse for the violation of this particular ordinance.

If, and only if, the sudden emergency existed will the defendant be excused from a violation of a statute or an ordinance. For a sudden emergency to exist you must first find that the defendant was confronted with an emergency; that is, a happening that could not be anticipated by the defendant, a happening that was sudden, and was not of his own making. If such occurrence could be reasonably anticipated or occurred with sufficient time to remove it from being sudden or if defendant created the emergency himself or itself, then no sudden emergency existed and the defendant is negligent for parking in a prohibited zone.

However, if you find that a sudden emergency existed, although the defendant is excused from complying with the statute or ordinance, he is still required to use ordinary care under all the facts and circumstances then existing. The danger, confusion and excitement of the situation, along with all the other facts, must be taken into consideration in determining whether ordinary care was exercised under those circumstances.

\* \* \*

If you find that a sudden emergency did exist, you should determine what the facts and circumstances were at that time; determine what the defendant did or did not do; and in the light of all these facts decide whether the defendant used ordinary care at that time. If he — or it did, then the defendant was not negligent in this respect; if the defendant did not, then it was negligent \* \* \*. 72.1

**South Carolina.**

1. The driver of a vehicle that gives evidence of motor trouble is under a duty to drive said vehicle off the main traveled portion of the highway if it is possible to do so and it can be reasonably anticipated that the vehicle is about to become disabled.

2. I further charge that the burden of proving the necessity or excuse for stopping on the main traveled portion of the highway or the practicability of moving off such portion of the highway is on the individual making such a stop.<sup>72.2</sup>

<sup>72.1</sup> Pitz v. Motor Freight, Inc., 115 OhApp 271, 184 NE2d 915 (1961).

<sup>72.2</sup> Dudley Trucking Co. v. Hollingsworth, 243 SC 439, 134 SE2d 399 (1964).

**§ 474. Police vehicles.****Florida.**

Authorized emergency vehicle: Vehicles of the fire department (fire patrol), police vehicles and such ambulances and emergency vehicles of municipal departments or public service corporations and ambulances operated by private corporations as are designated or authorized by the Department of Public Safety or the chief of police of an incorporated city or any duly elected sheriff of the various counties \* \* \*.<sup>80.1</sup>

<sup>80.1</sup> Parker v. Chew (FlaApp), 280 S2d 695 (1973).

**§ 475. Vehicles used for fighting fire or rescuing property from fire.****Florida.**

Authorized emergency vehicle: Vehicles of the fire department (fire patrol), police vehicles and such ambulances and emergency vehicles of municipal departments or public service corporations and ambulances operated by private corporations as are designated or authorized by the Department of Public Safety or the chief of police of an incorporated city or any duly elected sheriff of the various counties \* \* \*.<sup>81.1</sup>

<sup>81.1</sup> Parker v. Chew (FlaApp), 280 S2d 695 (1973).

**§ 476. Ambulances.****Florida.**

Authorized emergency vehicle: Vehicles of the fire department (fire patrol), police vehicles and such ambulances and emergency vehicles of municipal departments or public service corporations and ambulances operated by

private corporations as are designated or authorized by the Department of Public Safety or the chief of police of an incorporated city or any duly elected sheriff of the various counties \* \* \*.<sup>87.1</sup>

<sup>87.1</sup> Parker v. Chew (FlaApp), 280 S2d 695 (1973)

#### § 477A. Snowmobiles.

##### Minnesota.

\* \* \* The C.E.F. Church is subject to liability for physical harm caused to its invitees by a condition on the land, if, but only if, it

1. Knows of it or by the exercise of reasonable care could discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and,

2. Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

3. Fails to exercise reasonable care to protect them against the danger.<sup>90.1</sup>

<sup>90.1</sup> Isler v. Burman, — Minn —, 232 NW2d 818 (1975).

#### § 480. Successive collisions and collision of several vehicles.

##### Illinois.

If you find that the defendant, M. W., was not guilty of negligence at or immediately before her collision with the defendant, M. G., but you find rather that the said M. W. negligently failed to maintain proper control of her automobile following said collision and that said failure was the direct and proximate cause of her automobile colliding with the automobile of the plaintiffs, you will find the said defendant, M. W., guilty of negligence with respect to plaintiffs.<sup>12.1</sup>

<sup>12.1</sup> Rysdon v. Wice, 34 IllApp2d 290, 180 NE2d 754 (1962).

#### § 481. Liability of private owner or operator of motor vehicle for injuries to passengers.

##### Alabama.

I charge you that if you are reasonably satisfied from the evidence in this case that the plaintiff, M. D., fell as a result solely of losing her balance and that the movement of the car from which she had just alighted did not in any way contribute to her loss of balance then you should return a verdict for the defendant.<sup>14.1</sup>

**Arkansas.**

The plaintiffs have alleged that the defendant was negligent in one or more of the following respects:

- (2) failing to keep her vehicle under proper control and
- (3) in operating the automobile at a speed in excess of that which was reasonable and prudent under the circumstances then existing.

You are instructed that under the laws of the state of Arkansas it was the duty of the defendant, L. S., to exercise ordinary care in the operation of her vehicle to avoid injury to others, and that a failure on her part to exercise such care would be evidence of negligence. Ordinary care requires every person who operates a motor vehicle upon a public highway to keep his or her vehicle under such control as will enable him or her to check its speed, or to stop it absolutely, if necessary to avoid injury where danger is apparent or reasonably to be anticipated by the exercise of ordinary care. Further, it was the duty of the defendant to exercise ordinary care to operate her vehicle at a speed no greater than was reasonable and prudent under the circumstances, and that a failure to do so would be evidence of negligence.

You are further instructed in that connection that the lawful maximum speed at which the defendant's vehicle might have been operated at the time and place of the accident here involved was that speed which was reasonable and prudent under the circumstances, but not to exceed 60 miles per hour in any event, and should you find that defendant's vehicle was being operated at the time and place of the accident here involved at a speed which was not reasonable and prudent under the circumstances this would be evidence of negligence to be considered along with other circumstances in the case.

\* \* \*

Now should you find from a preponderance of the evidence that the defendant, L. S., was guilty of negligence in one or more of the respects alleged by the plaintiff, as just related to you, this negligence, without more, would not entitle the plaintiffs to maintain this action, or to recover their damages, if any. As you have previously been instructed, to recover in this action, if at all, plaintiffs must prove by a preponderance of the evidence that the defendant was guilty of wilful and wanton conduct. They must prove not only that the defendant was negligent, but also that she knew, or had reason to believe, that her act of negligence was about to inflict injury, and that she continued in this course of conduct with a conscious indifference to the consequences thereof, exhibiting a wanton disregard of the rights and safety of others.<sup>14 2</sup>

**Indiana.**

In evaluating guest cases, our courts have laid down certain guidelines for the trial courts to follow:

1. An error of judgment or a mistake standing alone, on the part of the host, will not amount to wanton or wilful misconduct.
2. The host must have manifested an attitude adverse to the guest, or of "perverseness," in that the host must have shown he was indifferent to the consequences of his conduct.

3. The entire course of conduct of the host leading up to the accident must be considered.

4. If the circumstances are such that reasonable men would know and conclude that their conduct under such circumstances entailed a probability of injury, then the host is chargeable with such knowledge.<sup>19 2</sup>

#### Michigan.

I instruct you, members of the jury, that at the time of this accident the plaintiffs were engaged in a joint venture. If you find that either of the plaintiffs were negligent, that such negligence was a proximate cause of the accident, then both plaintiffs should be barred from recovery, and your verdict would be for the defendant.<sup>19 1</sup>

<sup>14.1</sup> Dean v Mayes, 274 Ala 88, 145 S2d 439 (1962).

<sup>14.2</sup> Spence v Vaught, 236 Ark 509, 367 SW2d 238 (1963).

<sup>19 1</sup> Massey v Scripser, 64 MichApp 561, 236 NW2d 142 (1975).

<sup>19.2</sup> Fielitz v Allred, — Ind —, 364 NE2d 786 (1977).

### § 482. —Contributory and imputed negligence of injured person.

#### Missouri.

The court instructs the jury that if you find and believe from the evidence that on the occasion mentioned in evidence G. T. H. was the owner of the automobile involved in the casualty described in evidence and if you further find and believe from the evidence that on the evening of April 17, 1957, W. C. had been drinking intoxicating liquors and by reason thereof, his ability to prudently drive an automobile was impaired, if you so find, and if you further find that G. T. H. knew or in the exercise of ordinary care for his own safety, should have known of the aforesaid facts, if you find them to be facts, and that thereafter G. T. H. carelessly and negligently allowed and permitted W. C. to drive his automobile, if so, and if you find that G. T. H. carelessly and negligently rode in said automobile while same was being driven by W. C., if so, and if you further find that said automobile was thereafter operated by W. C. west on Commerce Street at a high and dangerous rate of speed under all of the facts and circumstances then and there existing, if so, and that G. T. H. negligently failed to timely protest to W. C. about the manner and speed at which said automobile was being operated, if so, and negligently failed to take any affirmative action to influence the manner in which said automobile was being operated by W. C., if so, and if you further find that the aforesaid negligence, if any, of G. T. H. directly caused or directly contributed to cause the death of G. T. H., then your verdict must be for the defendant.<sup>40.1</sup>

<sup>40.1</sup> Hopper v. Conrow (Mo), 347 SW2d 896 (1961).

**§ 483. Persons liable for negligence of operator.****Texas.**

You are instructed that under Texas law "permission" may be either express or implied.

You are further instructed that "permission" means consent to use the vehicle in question at the time and place in question and in a manner, authorized by the owner, either express or implied.

In arriving at your verdict, it is proper for you to consider the breadth or restriction of the authority given, if any, and whether or not there has been a material deviation from the scope of such permission. Under Texas law, once initial permission has been given, the borrower may use such vehicle for any purpose reasonably within the intention of the parties unless there is a material deviation from such permissive use.

You are further instructed that not every deviation or departure from the purpose, place, distance and time, or a combination of them, will operate to cancel or destroy the permission which the user of the vehicle originally had from its owner. If the deviation is material, such original permission is destroyed; if immaterial, it is not. The question of materiality must be determined from all the circumstances relating to the entire course of conduct of the parties as it related to the handling of the vehicle in question.<sup>48 2</sup>

<sup>48.2</sup> Allstate Ins. Co v. Smith (TexCivApp),  
471 SW2d 620 (1971).

**§ 487. — Owners generally.****Louisiana.**

\*\*\* The very basis of liability in such cases for a tort committed in the husband's abence by the wife while using an automobile belonging to the community is agency; hence his permission, actual or implied, for the use of the car by the wife and that she was engaged in the service of her husband or in activity for the benefit of the community are necessary elements, \*\*\*.<sup>56 1</sup>

**Minnesota.**

There is an inference that one driving another's vehicle is driving that vehicle with the permission of the owner. The burden of proof to prove the ownership of the car that defendant was driving and its driver was the agent of the owner at this time is upon the plaintiff.<sup>56 2</sup>

**Nebraska.**

The appellate court found the joinder of the insurer and the motorist was improper. A trial court must first obtain judgment against the motorist before proceeding against the insurer.

On remand for the issue of damages, the insurer's interest can be protected by intervention. The court should not instruct the jury as to the existence of the liability insurance or the monetary limitation of coverage. The insurer's participation in the trial is not to be disclosed to the jury.<sup>56.3</sup>

<sup>56.1</sup> Hill v Benoit (LaApp), 358 S2d 326 (1978).

<sup>56.3</sup> Eich v State Farm Mut. Auto Ins. Co., 305 NW2d 621 (Neb 1981)

<sup>56.2</sup> Newcomb v. Meiss, 263 Minn 315, 116 NW2d 593 (1962).

### § 489. — Owner riding in vehicle.

Nevada.

The evidence shows in this case that at the time the accident occurred, C. E. J., the owner of the Chevrolet automobile, had requested G. H. to drive it and that while it was being so driven, the owner remained in the vehicle as a rider therein. Under such circumstances, it is presumed that the driver was operating the vehicle as the agent of the owner, and if you should find by a preponderance of the evidence that the driver, G. H. was negligent in the operation of the Chevrolet automobile, such negligence is imputed to the owner, C. E. J.

If you find, however, from a preponderance of the evidence, that C. E. J. permitted G. H. to drive his automobile, and in so doing he did not retain control of the direction over the automobile while G. H. was driving it, then you may find the presumption of agency is rebutted, and regardless of whether G. H. was negligent or not, it cannot be imputed to C. E. J. to deprive plaintiffs of any damage to which you might otherwise find them entitled under these instructions.<sup>66.1</sup>

<sup>66.1</sup> Rocky Mountain Produce Trucking Co. v. Johnson, 78 Nev 44, 369 P2d 198 (1962).

### § 491. — Owner permitting operation of defective vehicle.

Minnesota.

Now, one who is engaged in the business of letting or leasing out automobiles for hire, like the \_\_\_\_\_ Corporation in this case, does not by that fact alone become an insurer of the absolute integrity of the automobile involved; but he must exercise reasonable diligence to know the condition of his cars before he lets them out. Again, one who rents or leases a motor vehicle, such as \_\_\_\_\_ did in this case, to another, must exercise that degree of care and skill in the selection of the car which he sends out, which a prudent man, having regard to the circumstances of the occasion, would bestow on the matter. He is liable for injuries or damages not only resulting from those defects about which he knows, but he is also liable for those which he could have discovered in the exercise of reasonable care, to see that the vehicle is reasonably, or was reasonably safe for use, and to discover defects in it, even where he has no actual knowledge of the presence of a defect or knowledge of facts which would indicate the presence of a defect.



The supplier or a renter of cars, such as \_\_\_\_\_ here, has a duty to use reasonable care to inspect the car to protect others who are going to use it from any unreasonable risk or harm while the car is being used for their intended purpose. And a supplier of cars, again, a renter or lessor of cars has a duty to give a reasonable warning as to any dangers which are inherent to him or reasonably foreseeable in using the car in the manner specified.

Now you will consider whether the defendant, the \_\_\_\_\_ Corporation was negligent and, if so, whether that negligence was a proximate cause of any injuries suffered by Mr. B. If you should find that the \_\_\_\_\_ Corporation was not negligent, or if you find that it was negligent, but that its negligence was not a direct or proximate cause of any injury to Mr. B., then Mr. B. is not entitled to recover. However, if you should find that the defendant, the \_\_\_\_\_ Corporation, was negligent and that its negligence was a proximate cause of the injuries suffered by Mr. B., then Mr. B. is entitled to recover, unless he was himself guilty of some negligence which proximately contributed to cause his accident. If you should find that Mr. B. was negligent and that his negligence contributed as a proximate cause of his own accident and the injury, then he would not be entitled to recover.

On the other hand, if you should find that \_\_\_\_\_ was negligent, and that its negligence was a proximate cause of Mr. B.'s injury, and if you also find that he was not negligent or if he was, his negligence did not proximately contribute to cause his accident, then Mr. B. would be entitled to recover, and you would come to and consider the issue of damages.<sup>67 1</sup>

<sup>67 1</sup> *Bossons v. Hertz Corp.*, 287 Minn 29, 176 NW2d 882 (1970)

#### **§ 492. — Owner permitting incompetent operator to drive.**

##### **Arkansas.**

You are instructed that if anyone permits another to drive his car, knowing that such person is in the habit of becoming intoxicated and driving a car in this condition, or, by the exercise of ordinary care should have known that such person is in the habit of becoming intoxicated and driving a car in this condition, the owner of the automobile is liable for any injury caused by the negligence of such driver that may have resulted from drunken driving.<sup>71 1</sup>

<sup>71.1</sup> *Rook v. Moseley*, 236 Ark 290, 365 SW2d 718 (1963).

#### **§ 495. — Violation of instructions or personal use by agent or servant.**

##### **Texas.**

You are instructed that under Texas law "permission" may be either express or implied.

You are further instructed that "permission" means consent to use the vehicle in question at the time and place in question and in a manner, authorized by the owner, either express or implied.

In arriving at your verdict, it is proper for you to consider the breadth or restriction of the authority given, if any, and whether or not there has been a material deviation from the scope of such permission. Under Texas law, once initial permission has been given, the borrower may use such vehicle for any purpose reasonably within the intention of the parties unless there is a material deviation from such permissive use.

You are further instructed that not every deviation or departure from the purpose, place, distance and time, or a combination of them, will operate to cancel or destroy the permission which the user of the vehicle originally had from its owner. If the deviation is material, such original permission is destroyed; if immaterial, it is not. The question of materiality must be determined from all the circumstances relating to the entire course of conduct of the parties as it related to the handling of the vehicle in question.<sup>21 1</sup>

<sup>21.1</sup> Allstate Ins. Co v Smith (TexCivApp),  
471 SW2d 620 (1971)

#### § 497. — Parent and child.

##### Georgia.

I charge you a principle of law known as the family-purpose doctrine under the law of Georgia, and the doctrine is where a parent keeps and maintains an automobile for the comfort and pleasure of his family, which, of course, would include a minor son, then the parent is liable for the negligence of the son driving an automobile with the parent's consent.

If from evidence in this case as applied to the law which I have given you in charge, and which I will give in charge, you find that the family-purpose doctrine is applicable in this case, then if you find that the son would be liable if he had been sued then in this case the father would be liable under the family-purpose doctrine.<sup>31.1</sup>

##### Idaho.

You are instructed that any negligence or wilful misconduct of a minor under the age 18 years when driving a motor vehicle upon a highway shall be imputed to the person who has signed the application of such minor for a permit or license, which person shall be jointly and severally liable with such minor for any damages caused by such negligence or wilful misconduct.<sup>31 2</sup>

<sup>31.1</sup> Long v. Serritt, 102 GaApp 550, 117,  
SE2d (216) (1960).

<sup>31.2</sup> Smith v. Sharp, 85 Idaho 17, 375 P2d 184  
(1962).

#### § 498. Approved jury instructions.

##### Arizona.

The following instruction held erroneous:

Inasmuch as the plaintiffs in this action are husband and wife, if you should find that either one was negligent and that such negligence contributed as a proximate cause of the accident, then, under our law, neither one may recover, although one may have been wholly innocent of any negligent conduct.<sup>44.1</sup>

**Illinois.**

Supreme Court Rule 239(a), Ill.Rev.Stat. 1967, ch. 110A, § 239(a), provides that an IPI instruction shall be employed where it is applicable to a case and where, after considering the facts and the prevailing law, the court determines that the jury should be instructed on the subject.<sup>1</sup>

**Missouri.**

In a case where approved jury instructions are applicable their use is mandatory. Any deviation from the prescribed form is presumed prejudicial unless the proponent of the deviation can clearly show that no prejudice could result from the deviation.<sup>2</sup>

**New Mexico.**

The purpose of the Order of the Supreme Court, at least in part, was to make it mandatory upon the trial court to use the U.J.I. instructions in all cases where applicable. The trial court need not use a U.J.I. instruction, even though the court determines the jury should be instructed on the subject thereof, if, and only if, the court finds the instruction to be erroneous or otherwise improper, and states into the record the reason for not using it.<sup>3</sup>

<sup>44.1</sup> *Heimke v Munoz*, 106 Ariz 26, 470 P2d 107 (1970).

<sup>1</sup> *Miyatovich v. Chicago Transit Authority*, 112 IllApp2d 437, 251 NE2d 345 (1969)

<sup>2</sup> *Brown v. St. Louis Pub Serv. Co. (Mo)*, 421 SW2d 255 (1967).

<sup>3</sup> *Chapin v Rogers*, 80 NM 684, 459 P2d 846 (1969).

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